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No. 90-1596

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In The

Supreme Court of the United States

October Term 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly ruled that section 318(b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989) – a unique one-year, one-time appropriations rider – violates the constitutional principle of separation of powers by directing the federal courts how to interpret and apply existing laws in a pending case without repealing or otherwise changing those laws?

PARTIES TO THE PROCEEDINGS

Respondents accept petitioners' description of the parties to the proceedings except that the National Audubon Society also was a plaintiff in the district court in the Western District of Washington and Salem Audubon Society, Sierra Club, and The Wilderness Society were also plaintiffs in the district court in the District of Oregon. These same parties also were appellants in the court of appeals. All of the respondent plaintiffs in No. C89-160(WD) (W.D. Wash.) and all of the respondent plaintiffs in No. C87-1160-FR (D. Ore.) are not-for-profit corporations and none of them has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 29.1.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Seattle Audubon Society, *et al.* (hereinafter "SAS"), respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

SAS accepts petitioners' identification of the opinion below except that the opinion of the court of appeals

reported at 914 F.2d 1311 is the fully amended opinion of that court as issued on October 30, 1990.

JURISDICTION

SAS accepts petitioners' statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

The full text of section 318(b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989) (hereinafter "section 318"), is set forth in the Petition for a Writ of Certiorari at pages 2-3. All of the other provisions of section 318 are set forth as Appendix F to the Petition. The relevant portions of the conference report accompanying the statute, H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. (1989), are set forth in Appendix F to this Brief, *infra*, 105a-125a.

STATEMENT OF THE CASE

The Solicitor General's petition for a writ certiorari in this case seeks review of an opinion of the United States Court of Appeals for the Ninth Circuit that declared unconstitutional one sentence of one provision – subsection (b)(6)(A) – of one section – 318 – of a one-year, one-time appropriations law that has now expired.[1] Although

[1] The conference report on section 318 states that the "measures included in this provision have been provided on an interim basis for fiscal year 1990 only. . . . " H.R. Conf. Rep. No. 264, *supra*, at 87 (App. F. at 118a).

the continuing litigation in this case does indeed involve "the ongoing controversy over logging in old growth forests in Oregon and Washington and the impact of that logging on the northern spotted owl," Cert. Pet. at 4 (quoting *Seattle Audubon Society v. Robertson*, 914 F.2d at 1312), the court of appeals opinion for which the Solicitor now seeks review has no impact on this controversy, nor on any legal issue in the controversy.

In addition, Congress has not reenacted any part of section 318 – or any similar law – since fiscal year 1990, nor is any future reenactment of such a provision probable. Likewise, no part of any provision of section 318 has been interpreted by any other court of appeals, nor will it be interpreted by another court because the section affected only the states of Washington and Oregon and only during fiscal year 1990.[2]

Finally, since the court of appeals' ruling in September of 1990, the administrative action that formed the basis of the case against the Forest Service in the Western District of Washington (hereinafter the *"SAS"* case) has been rescinded by the agency and replaced by a different

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[2] Moreover, the court of appeal's ruling addressed in the Solicitor's petition affects, at most, 16 Forest Service timber sales in Washington and Oregon offered for sale during fiscal year 1990, out of a total of more than 1000 timber sales offered during the fiscal year under section 318. The appellate court's ruling does not affect *any* timber sales offered by the Bureau of Land Management. In short, out of a total timber sale program of 8.8 *billion* board feet of timber to be offered from federal lands in Washington and Oregon during fiscal year 1990, the court of appeals decision that the government now asks this Court to review affects no more than 100 *million* board feet – about one percent of the timber volume offered under section 318.

administrative decision. This subsequent agency action recently also has been declared illegal, but on grounds completely unrelated to the court of appeals decision for which the Solicitor now seeks review. *See* App. B, *infra*, 38a-65a (order granting summary judgment against the Forest Service); App. A, *infra*, 1a-37a (order granting injunctive relief against the Forest Service).[3] Similarly, the Bureau of Land Management decision challenged in the District of Oregon (hereinafter the *"PAS"* case) has now been altered by a new decision that may or may not be set aside in the future for violations of federal environmental laws. *See* App. E, *infra*, 88a-104a (order dismissing plaintiffs' complaint).

The role that now-expired section 318 once played in this controversy is set out more fully below and in the opinions of the district courts and court of appeals reproduced in Appendices A, B, C, E, and G to this Brief. This history confirms the very limited and fact-specific nature of the court of appeals decision at issue in this petition for a writ of certiorari.

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[3] The Forest Service abandoned its earlier administrative plan because its own scientists and those of other federal agencies had concluded that the plan would not adequately protect the northern spotted owl and hence would not meet the requirements of the laws that govern the Forest Service. *See* App. A, *infra*, at 18a (Memorandum Decision and Injunction) ("in the Fall of 1990 the Forest Service admitted that the ROD was inadequate after all – that it would fail to preserve the northern spotted owl").

A. The Nature and History of Section 318.

1. Section 318 was a unique and limited statutory provision.

Congress enacted section 318 as a one-time, one-year statute "for making timber sales on Federal lands in Washington and Oregon, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old-growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. at 87 (1989), App. F, *infra*, at 118a. In enacting this unique legislation, Congress stated:

> The extraordinary measures included in this section, particularly with regard to judicial processes, have been reluctantly agreed to because of the failure of the agencies to take steps on their own to resolve these matters in a manner which could have prevented the current situation. These measures included in this provision have been provided on an interim basis for fiscal year 1990 only . . . .

Id., App. F, *infra*, at 118a. True to this statement, Congress has not reenacted *any* of the provisions in section 318 for subsequent fiscal years. Moreover, as the statute itself stated, all of its provisions expired on September 30, 1990, *see* App. F, *infra*, at 117a (section 318(k)), with the single exception that timber sales actually offered during fiscal year 1990 still are subject to the terms and conditions of section 318 for the life of the timber sale contract, *id.*[4] In short, section 318 was a unique statute limited to its own particular time and circumstances. Consequently, the court of appeals decision for which the Solicitor seeks

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[4] As explained below at note 7, this exception itself now appears to preclude any new legal challenge to timber sales sold under section 318 on the grounds raised in these cases.

this Court's review also is necessarily unique and limited to its own facts and circumstances.

2. Section 318(b)(6)(A), the provision of section 318 that the court of appeals struck down, was also unique.

One of Congress' purposes in enacting section 318 was to prevent the plaintiffs in these cases from proceeding on their claims against the defendant federal agencies during fiscal year 1990. *See* App. G, *infra*, at 137a-139a (Order on Motions Heard Dec. 5, 1990). Congress, however, did not seek to accomplish this goal either by repealing the statutes that formed the bases of the plaintiffs' claims in these cases or by withdrawing the federal courts' jurisdiction to hear the plaintiffs' claims under these statutes. Instead, Congress attempted to direct the courts how to interpret and apply the existing environmental laws to the plaintiffs claims in these cases during fiscal year 1990:

> . . . Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al. v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.

Section 318(b)(6)(A).

In other provisions of section 318, Congress specifically and expressly limited the courts' jurisdiction to entertain the plaintiffs' pending claims as they affected particular planned timber sales, *see, e.g.*, section 318(f)(1), Cert. Pet., App. F at 51(a) ("such timber sales . . . shall not be subject to further judicial review by any court of the United States."), or prescribed specific procedures for the plaintiffs to follow in making any new claims under section 318, *see, e.g.*, section 318(g)(1), Cert. Pet., App. F at 53a ("any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale"). Nowhere, however, did Congress expressly or by implication repeal the broad environmental laws of general application that formed the bases of the plaintiffs' claims in these cases.[5] Nor did Congress expressly or by implication withdraw federal court jurisdiction of the plaintiffs' claims under these laws.

Instead, in section 318(b)(6)(A), Congress "determined and directed" how the courts were to interpret and apply the general environmental laws to the plaintiffs' claims in these cases during fiscal year 1990. The court of appeals addressed only this singular aspect of section 318 in its opinion.

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[5] In section 318(f)(3), Congress did attempt to repeal expressly the laws at issue in this case for the specific and limited subset of timber sales addressed in that subsection. *See* section 318(f)(3), Cert. Pet., App. F at 52a ("Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceedings identified in subsection (f)(1) of this section. . . . "). No one has challenged this provision of section 318, not does it have any bearing on this petition for a writ of certiorari.

B. The Court of Appeals' Ruling on the Constitutionality of Section 318(b)(6)(A).

Following Congress' passage of section 318, plaintiffs challenged, first in the district court and then on appeal, the unique provision of section 318 – subsection (b)(6)(A) – that attempted to direct the courts how to resolve the claims in these cases in a particular way for fiscal year 1990. Plaintiffs argued that this language violated the constitutional separation of powers doctrine because, without repealing the existing laws at issue in this case, or withdrawing the court's jurisdiction of claims under these laws, Congress attempted to direct the courts how to apply the existing laws to the plaintiffs' claims. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871); *see also* L. Tribe, *American Constitutional Law*, § 3-5 at 50 (2d ed. 1988).

On November 14, 1989, the district court in the Western District of Washington rejected the plaintiffs' challenge to the constitutionality of section 318(b)(6)(A). Cert. Pet., App. C. On December 21, 1989, the district court in Oregon, faced with a similar constitutional challenge to the language of section 318(b)(6)(A), followed suit. Cert. Pet., App. E at 37a-38a.

The plaintiffs in *SAS* appealed the district court's decision upholding section 318(b)(6)(A) as constitutional under the provisions of 28 U.S.C. § 1292(b), while the plaintiffs in *PAS* appealed that court's dismissal of their case. The court of appeals denied the *SAS* plaintiffs' request for emergency relief from the provisions of section 318(b)(6)(A). *See* App. G, *infra*, at 131a (Order on Motions Heard Dec. 5, 1990). The cases were then consolidated and the appeals expedited and argued on April 3, 1990. The court of appeals decided both cases in a single

opinion first issued on September 18, 1990, and subsequently amended on October 30, 1990.

The court of appeals ruled that:

> Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements. The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.
>
> . . .
>
> This is what [*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)] and subsequent cases agree is constitutionally proscribed.

914 F.2d at 1316 (Cert. Pet., App. A at 13a-14a) (footnote omitted). The court then went on to hold that:

> We must uphold a statute if "it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid." . . . That Congress could possibly have written a valid statute, however, does not mean that we can "fairly" interpret the statute that Congress in fact enacted as constitutionally valid. The language of section 318 is clear: Congress not only legislated a forest management plan, §§ 318(b)(3), (b)(5), but also directed the courts to find that that plan satisfied the environmental laws underlying the ongoing litigation. § 318(b)(6)(A). In doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without

> changing the underlying laws, as it unquestionably cannot do.

Id. at 1317 (Cert. Pet., App. A at 15a-16a) (citations and footnotes omitted).[6]

Based on these holdings, the court of appeals concluded that "[t]he first sentence of subsection 318(b)(6)(A) violates the separation of powers doctrine." *Id.* (Cert. Pet., App. A at 17a)(footnote omitted).

C. Proceedings in the District Courts and the Court of Appeals Following the Court of Appeals' Ruling on the Constitutionality of Section 318(b)(6)(A).

1. Proceedings Related to the Ruling on the Constitutionality of Section 318(b)(6)(A).

The proceedings in the district courts and the court of appeals as a result of the court of appeals' invalidation of section 318(b)(6)(A) have been quite limited and they are now over. In these proceedings, *no* Bureau of Land Management timber sales offered under section 318 have been affected in any way. Only 18 Forest Service timber sales have even been challenged. Sixteen of these 18

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[6] In dicta, the court noted further that:

> even if we could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes. That is what we held in *Portland Audubon Society v. Hodel*, 866 F.2d [302,] 307 [(9th Cir.), *cert. denied*, 109 S. Ct. 3229 (1989)], Congress could not do in an appropriations measure.

914 F.2d at 1317 (Cert. Pet., App. A at 16a). Petitioners incorrectly treat this dicta as a principle holding in the court of appeals' decision, *see* Cert. Pet. at 18-19, while ignoring the court's actual holding quoted above in the text.

Forest Service sales have been enjoined for violations of the environmental laws. *See* App. D, *infra*, at 85a-88a (order on renewed motion for summary judgment re six timber sales); App. G., *infra*, at 126a-143a (Order on Motions Heard Dec. 5, 1990). At this time, there is no likelihood that anyone will commence additional challenges to timber sales offered under section 318 on any of the grounds raised in these cases simply because the provisions of section 318 that are unaffected by the court of appeals ruling now insulate these sales from judicial review.[7]

Of the 16 Forest Service fiscal year 1990 timber sales presently enjoined for violations of the environmental laws, 12 of the sales were enjoined by the district court in an order entered on December 17, 1990. The plaintiffs challenged these sales within 15 days of initial advertisement as required by section 318(g)(1). The bases for the challenges to these sales, however, were barred by section 318(b)(6)(A) until the court of appeals invalidated that provision in the opinion at issue here. A copy of the district court's order enjoining these 12 sales is reproduced as Appendix G to this Brief.

The remaining 4 Forest Service timber sales that have been enjoined in the wake of the Ninth Circuit's ruling

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[7] Section 318(g)(1) required challenges to any timber sales to be filed within 15 days of initial public advertisement of the sale. Section 318(g)(1) (Cert. Pet., App. F at 53a). Section 318(k) continues the application of this limitations period to timber sales offered under section 318. Section 318(k) (Cert. Pet., App. F at 55a). In any event, the plaintiffs in *SAS* have waived their right to challenge additional Forest Service fiscal year 1990 timber sales on the grounds raised in these cases. *See* App. A, *infra*, at 31a (Memorandum Decision and Injunction).

striking down parts of section 318(b)(6)(A) were initially challenged, along with two other sales, outside the fifteen-day limitations period of section 318(g)(1), but within 15 days following the court of appeals decision regarding subsection (b)(6)(A). Plaintiffs argued that the challenges were timely because the doctrine of equitable tolling suspended the fifteen-day limitations period while plaintiffs were unconstitutionally prevented from challenging timber sales for violations of the environmental laws by section 318(b)(6)(A).

The district court rejected plaintiffs' argument that the challenges were timely and plaintiffs appealed. On April 26, 1991, the court of appeals, following this Court's recent decision in *Irwin v. Veterans Administration*, 111 S. Ct. 453 (1990), ruled that the doctrine of equitable tolling is available in this case and tolled the limitations period of section 318(g)(1) for the six sales plaintiffs had challenged. *Seattle Audubon Society v. Robertson*, 931 F.2d 590, ___ (9th Cir. 1991) (App. C, *infra*, at 82a). On remand, plaintiffs renewed their request for an injunction against these sales. The district court, on May 24, 1991, enjoined four of the six sales but refused to enjoin two sales where substantial logging already had occurred. *See* App. D at 85a-87a (order on renewed motion re six timber sales).

2. Subsequent Proceedings Unrelated to the Provisions of Section 318.

Although the Solicitor implies that the court of appeals decision striking down section 318(b)(6)(A) has had important consequences for this case, in fact, the significant legal rulings in these cases since the Ninth Circuit's decision on the constitutionality of subsection 318(b)(6)(A) have not involved in any way either the

provisions of section 318 or the court of appeals decision regarding that statute. The reasons that none of the major rulings on remand have involved section 318 or the issues related to the statute's constitutionality are simple: (1) section 318 has expired and Congress has not reenacted any part of it; and, (2) both the Forest Service and the Bureau of Land Management have made new administrative plans or decisions for spotted owl habitat that are completely different from those in place at the time Congress enacted section 318. In short, section 318 is history and not very relevant history at that.

a. The New Forest Service and Bureau of Land Management Administrative Decisions for Managing Spotted Owl Habitat.

On September 28, 1990, only ten days after the Ninth Circuit ruled that section 318(b)(6)(A) violated the constitutional separation of powers doctrine, the Forest Service – citing reasons unrelated to the Ninth Circuit's ruling – vacated its administrative plan that had provided a background for many of the provisions of section 318 and plaintiffs' claims against the agency in this case. *See* 55 Fed. Reg. 40413 (October 3, 1990). In place of the old plan, the agency announced an interim approach to managing suitable northern spotted owl habitat. *Id.* Several days earlier, on September 25, 1990, the Bureau of Land Management likewise announced a new decision for managing spotted owl habitat. *See* App. E, *infra*, at 92a-94a (opinion dismissing complaint).

In the *SAS* case, this change in administrative plans led the plaintiffs to file an amended complaint that challenged the agency's new plan for managing owl habitat and to the dismissal as moot of the plaintiffs' claims

against the old plan. *See* App. B, *infra*, at 45a, 61a-63a (Order on Motions for Summary Judgment and For Dismissal). In *PAS*, the district court has recently dismissed the plaintiffs' existing complaint, *see* App. E, and the plaintiffs have moved to file an amended complaint to reassert their claims against that agency's owl habitat management decisions that the district court concluded – for reasons unrelated to section 318 – were not properly before it. If the district court in Oregon allows the *PAS* plaintiffs to amend their complaint, they will continue their challenge to the Bureau of Land Management's program for logging spotted owl habitat. This continued challenge, however, will have nothing to do with either section 318 or the court of appeals decision invalidating subsection (b)(6)(A).

b. Plaintiffs' Legal Challenges to the Agencies' New Administrative Actions.

The plaintiffs in *SAS* have succeeded in their challenge to the Forest Service administrative program announced on September 28, 1990. On March 7, 1991, the district court ruled that this new program violated the requirements of the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, *see* App. B (Order on Motions for Summary Judgment and For Dismissal), and on May 23, 1991, following an eight-day hearing, the court permanently enjoined the Forest Service from selling additional timber sales in owl habitat until the agency complies with the law, *see* App. A (Memorandum Decision and Injunction). The court also established a compliance schedule for the agency. App. A, *infra*, at 21a-23a, 37a. Although these recent rulings certainly affect the Forest Service's ability to sell for logging suitable spotted owl habitat, the

rulings have *nothing* to do with either section 318 or the court of appeals opinion that the government has asked this Court to review.

REASONS FOR DENYING THE PETITION

A. Summary of Argument.

The Solicitor has failed to offer any compelling reasons why this Court should review the court of appeals opinion. More importantly, the Solicitor has obscured the unique, fact- and time-specific nature of the court of appeals opinion. Because the Ninth Circuit's decision addresses only a limited, expired and no longer relevant statutory provision, this case is simply not appropriate for Supreme Court review.

It is axiomatic that this Court does not exercise its discretionary jurisdiction to review decisions of the courts of appeal that are not significant in any way. *See* Supreme Court Rule 10; *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1972) (Harlan, J., concurring). The court of appeals decision for which the Solicitor seeks review in this case fails to meet any standard of significance even though it involves a decision invalidating on constitutional grounds a provision of an act of Congress.[8]

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[8] Indeed, Congress recently repealed 28 U.S.C. § 1252 (repealed 1988), which provided mandatory review in this Court of decisions of the lower courts declaring Acts of Congress unconstitutional. The purpose of this repeal was to avoid automatic review in this Court of unimportant or insignificant decisions invalidating a congressional enactment. *See* H.R. No. 660, 100th Cong., 2d Sess. at 2, 9-11, *reprinted in* 1988 U.S. Code Cong. & Admin. News 766, 774-776. This case presents just such an unimportant constitutional adjudication.

The reason this case is not significant is simple: the law the court of appeals interpreted was a unique, one-time statute that has expired and that does not have any continuing application to additional government activities. *See* Section 1 below.

It also is fundamental to this Court's discretionary jurisdiction that it does not review decisions of the courts of appeal where there is no existing or potential conflict between the rulings of the different courts of appeal. *See* Supreme Court Rule 10. Here there is no existing or potential conflict. The statute that the court of appeals decision addressed applied to only two states within the Ninth Circuit for only one year – and the statute itself has now expired. Nor is there a broader conflict among the circuits regarding the interpretation of this Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), or one concerning the scope of the separation of powers doctrine, as the Solicitor suggests. *See* Section 2 below.

Finally, even if this case were significant (which it is not), and even if there were a conflict among the circuits regarding *Klein* and separation of powers (which there is not), the Court should not grant review of the court of appeals decision in this case because the decision correctly applies uncontroversial constitutional principles to a particular and unique set of facts. *See* Section 3 below.

B. Argument

1. The Court of Appeals Decision Addressed in the Solicitor's Petition Has No Practical Significance.

The Solicitor's petition claims that the "litigation unfolding on remand vividly shows . . . the very dilemma Congress sought to avoid when it enacted section 318."

Cert. Pet. at 25-26. But this on-going litigation actually exemplifies "a deliberate and systematic refusal by the Forest Service and the [U.S. Fish & Wildlife Service] to comply with the laws protecting wildlife." App. A, *infra*, at 21a (Memorandum Decision and Injunction). This is indeed a serious dilemma – and one that Congress recognized in enacting section 318, *see* App. F, *infra*, at 118a (conference report) – but it is not in any way a dilemma occasioned by the court of appeals decision.

That decision found that one sentence of section 318(b)(6)(A) violated the constitutional separation of powers doctrine. 914 F.2d at 1317 (Cert. Pet., App. A at 17a). This sentence – indeed the entire statute that contained the sentence – has now expired. Moreover, in separate litigation, the courts have ruled that the government did all that it was required to do to comply with the provisions of section 318. *See Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1083 (D. Ore. 1990) ("*GPA I*"); *Gifford Pinchot Alliance v. Butruille*, 752 F. Supp. 967, 970-72 (D.Ore. 1990) ("GPAII"). Furthermore, Congress has not reenacted section 318, or subsection (b)(6)(A), or any similar statutory provision. In fact, Congress in the conference report on section 318 indicated that it would not do so. *See* App. F, *infra*, at 118a (the "measures included in this provision have been provided on an interim basis for fiscal year 1990 only . . . ").

In addition, the actual effects of the court of appeals decision on timber sales from federal lands in Washington and Oregon are inconsequential. Of the more than 1000 timber sales offered by federal agencies under section 318 during fiscal year 1990 while the statute was in effect, the court of appeals decision allowed plaintiffs to enjoin only 16 Forest Service timber sales for violations of

the environmental laws. Even though the court of appeals recently ruled that plaintiffs in the *SAS* case might have an opportunity to file additional timely challenges to timber sales sold under section 318, *see Seattle Audubon Society v. Robertson*, 931 F.2d 590, ___ (9th Cir. 1991) (App. C, *infra*, at 82a-84a), the plaintiffs have unequivocally elected not to pursue these challenges. *See* App. A, *infra*, at 31a (Memorandum Decision and Injunction).[9]

More important still, the continuing litigation in these cases has nothing to do with section 318, subsection (b)(6)(A), or the court of appeals decision. *See supra* at 13-15 (discussing history of cases following the court of appeals decision).[10]

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[9] The fact that several billion board feet of timber sold under section 318 are still subject to the terms of the statute through section 318(k), *see* Cert. Pet at 25, does not affect this conclusion. Nothing in subsection (k) or elsewhere in the statute would revive the right to file new challenges under section 318 to timber sales that have been advertised, offered and awarded to a timber purchaser. The fact that many existing timber sale contracts are affected by section 318(k) is thus purely a matter of historic, but not practical or legal, interest.

[10] The court of appeals decision also has no real legal significance for many of the same reasons that it has no practical importance. The statute the court of appeals addressed has expired and has not been reenacted. Even while it existed, the law affected only two states, Washington and Oregon. Moreover, as explained below in sections 2 and 3, the court of appeal's decision applies an uncontroversial distillation of the separation of powers doctrine correctly to a peculiar and now historic set of legislative facts.

In light of these circumstances, the Solicitor's assertion that the court of appeals decision has "substantial practical significance" rings hollow. Cert. Pet. at 25. Indeed, the situation presented in this petition is much like the situation in *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971) (Harlan, J., concurring), where the Court dismissed a writ of certiorari as improvidently granted. In the *Triangle Improvement Council* case, Congress repealed the statute that the lower court had interpreted after this Court agreed to hear the case. Moreover, the provisions of the repealed statute continued to apply to fewer than 10 individuals. *Id.* at 500. As Justice Harlan observed, "every individual alleging that he has been abused by the exercise of federal power should, as a general matter, be heard, even where his situation becomes unique due to repeal or cessation of the actions he challenges." *Id.* Nonetheless, Justice Harlan concluded that the *Triangle Improvement Council* case presented "a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import." *Id.*; *see also Sanks v. Georgia*, 401 U.S. 144 (1971) (appeal challenging constitutionality of Georgia statute dismissed following repeal of state law at issue because the Court could not determine to what extent adjudication of issues in the case would be material to any further litigation ensuing on remand).

This case presents the Court with the same situation addressed in *Triangle Improvement Council* and *Sanks*, albeit at one step earlier in the process – before a petition for a writ of certiorari or an exercise of appellate jurisdiction has occurred. Here, the Solicitor seeks review of an expired statute that will not be reenacted. Moreover, the effects of the decision that the Solicitor brings before this

court are limited to a handful of timber sales that barely constitute one percent of the sales offered under section 318. As in *Triangle Improvement Council*, adjudication of this case would not be "a provident expenditure of the energies of the Court." 402 U.S. at 503.

2. The Court of Appeals Decision Creates Neither a Specific nor a General Conflict with the Opinions of this Court or Other Courts of Appeal.

The Solicitor asserts that the court of appeals adopted a "substantially overbroad" construction of this Court's opinion in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), *see* Cert. Pet. at 19, and that the court's opinion "cannot be squared" with other circuits' readings of *Klein*, *id*. The Solicitor does not, however, argue – and could not argue – that the court of appeals' interpretation of section 318(b)(6)(A) conflicts with this Court or any other appellate court's interpretation of that statute. Nor does the decision rely on an incorrect interpretation of *Klein* that conflicts with this Court or any other court's reading of *Klein*. In short, the Solicitor cannot show that this case falls within the scope of Supreme Court Rule 10.1(a).

a. The Court of Appeals Opinion Does Not and Will Not Conflict With Other Appellate Interpretations of Section 318.

Section 318 applied only to the states of Washington and Oregon and only during fiscal year 1990. The statute has now expired. The time for challenging timber sales offered under its provisions also has passed. *See* Section 318(g)(1) (Cert. Pet., App. F at 53a). Even though the limitations period of section 318 was equitably tolled in

one instance, *see* (App. C, *Seattle Audubon Society v. Robertson*, 931 F.2d at ___ *infra*, at 82a), that period of equitable tolling too has passed and, in any event, the plaintiffs in *SAS* have formally waived their right to pursue additional challenges to timber sales offered pursuant to section 318 on the environmental grounds raised in this litigation. App. A, *infra*, at 31a (Memorandum Decision on Injunction).

Under these circumstances, no other appellate court is ever likely to interpret any provision of section 318, let alone address the constitutionality of subsection (b)(6)(A). The statute simply never affected any area outside the Ninth Circuit and whatever effects the court of appeals decision once had within the circuit are over and settled. Neither the outcome of the government's current appeals from the district court decisions enjoining 16 Forest Service timber sales after section 318(b)(6)(A) was struck down, nor any of the other on-going proceedings in these cases, will require the court of appeals to reëxamine the constitutionality of section 318(b)(6)(A). Accordingly, there is not now and there never will be conflicting opinions of the courts of appeal regarding section 318(b)(6)(A).

b. The Court of Appeals Opinion Does Not Conflict With the Opinions of this or any Other Court that Interprets *Klein*.

The Solicitor, unable to identify a specific conflict between the court of appeals opinion and the opinions of this or any other appellate court, resorts to the assertions that the court of appeals opinion invokes a "substantially overbroad interpretation of [*Klein*]." Cert. Pet. at 19, that this Court's prior opinions applying or citing *Klein* are "confusing," *id.* at 19, 21, and that the courts of appeal

have given *Klein* "disparate" treatment, *id.* at 22. None of these assertions is accurate.

The court of appeals opinion reads *Klein* to stand for the narrow proposition that "Congress [cannot] prescribe a rule for the decision of a cause in a particular way[] without changing the underlying laws." 914 F.2d at 1317 (Cert. Pet., App. A at 16a). The court did *not* state, as the Solicitor claims, that "*Klein* [prohibits] Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions." Cert. Pet. at 23. Indeed, the Ninth Circuit explicitly recognized that Congress *can* repeal or change the applicable substantive laws to affect a pending case. 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-15a) (citing and distinguishing as permissable Congress' actions in *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419 (9th Cir. 1989) and ruling that in passing section 318 to address these cases "Congress did not amend or repeal laws, as it unquestionably could do"). The court, however, concluded that Congress had failed to make, either expressly or by implication, such changes in the underlying laws at issue in this case. *See* Section 3 below.

The court of appeals reading of *Klein* is not in any sense overbroad or unusual. In discussing the *Klein* decision and the separation of powers doctrine, Professor Laurence Tribe has observed that, under its narrowest and least controversial formulation:

> the separation of powers does limit congressional regulation of the decisionmaking processes of article III courts at least this much: if Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases.

L. Tribe, *American Constitutional Law*, § 3-5 at 50 (2d ed. 1988); *see also* G. Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the On-Going Debate," 36 Stan. L.Rev. 895, 910 (1984) ("virtually all commentators agree that, even if congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases"). It is precisely this narrow formulation of the separation of powers doctrine that the court of appeals adopted and applied in this case. 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-15a).

None of the decisions of this Court that the Solicitor cites conflict with the court of appeals' reading of *Klein* as the Solicitor attempts to suggest. *See* Cert. Pet. at 21. First, *Hart v. United States*, 118 U.S. 62, 66 (1886), and *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 152 (1872), are two additional reconstruction era cases that addressed the effects of contemporaneous legislation and pardons on claims against the United States. In neither *Hart* nor *Carlisle* did the Court narrow the holding of *Klein* or eschew the basic principle that Congress cannot direct the judiciary how to apply a particular existing law in a particular pending case without changing either the underlying law or the courts' jurisdiction.[11]

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[11] Indeed, the Court's reasoning in *Hart* confirms this basic point. There, the Court observed:

> [W]e do not depart, in the least, from what was held, on the subject of pardons, in . . . *United States v. Klein*, [80 U.S.] 13 Wall. 128 [(1871)] . . . . If the joint resolution [in this case] had said nothing on the subject of a pardon, no pardon could have had the effect to authorize the payment out of a general

(Continued on following page)

Second, the more recent case of *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion), does not undercut the basic formulation of the separation of powers doctrine that the court of appeals applied in this case for the simple reason that the Court's concern in *Glidden* was to determine the judicial nature of the Court of Claims, *id.* at 552, not to define the reach of Congress' powers to affect pending cases. Finally, the court of appeals decision does not conflict with this Court's opinion in *United States v. Sioux Nation*, 448 U.S. 371, 404-405 (1980). As the Court noted, the statute at issue in *Sioux Nation* did not attempt to direct the courts how to apply an existing law to a particular case without changing that law; instead, in *Sioux Nation* Congress "waived the defense of res judicata so that a legal claim could be resolved on the merits." *Id.* at 406. The court of appeals decision in this case simply does not conflict with any of the decisions of this Court

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(Continued from previous page)

> appropriation, of a debt which a law of Congress had said should not be paid out of it. The pardon cannot have such effect ascribed to it [that is, to authorize a payment] merely because the joint resolution says that it shall not have such effect.

118 U.S. at 67 (citations omitted). Thus the law at issue in *Hart* did not attempt to direct the judiciary how to decide a case under an existing but unchanged law as the statute did in *Klein*; instead, the joint resolution in *Hart* merely prohibited the payment of certain classes of claims against the United States, regardless of whether the claimant had received a pardon from the President.

that the Solicitor cites; nor does it involve any "confusing" formulation of the separation of powers doctrine as the Solicitor implies.[12]

Thus while the outer contours of the separation of powers doctrine, and the *Klein* decision as discussed in the different opinions of this Court, may not have been fully articulated yet, the only principle the court of appeals drew from *Klein* and this Court's decisions regarding the separation of powers doctrine is a narrow and unassailable one: although Congress unquestionably can change the law at issue in a case and may withdraw the courts' jurisdiction of claims under an existing law, it cannot direct the federal courts how to interpret and apply an existing and unchanged law in a particular case. 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-15a).

This simple principle also does not conflict with the decisions from other courts of appeal as the Solicitor claims. In fact, *Temple University v. United States*, 769 F.2d 126, 134 n. 4 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), and *Demartino v. Commissioner*, 862 F.2d 400, 408 (2d Cir. 1988), to the extent they address *Klein* at all, are consistent with the separation of powers principles that the court of appeals applied in this case. The Solicitor's citation of the dissenting opinion in *Barcellos & Wolfsen v.*

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[12] The other opinions of this Court that the Solicitor cites, *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 467 (1989) (Kennedy, J., concurring in the judgment), and *Austin v. United States*, 155 U.S. 417, 424-425 (1894), involve, on the one hand, the holding of *Klein* that relates to the separation of powers between the legislative and executive branches (a problem not at issue in this case), and, on the other, the simple application of a statute restricting the courts' jurisdiction to hear certain claims. Again, the court of appeals opinion conflicts with neither case.

Westlands Water Dist., 899 F.2d 814, 830 (9th Cir.) (Fernandez, Circuit Judge, dissenting), *cert. denied*, 111 S.Ct. 555 (1990), for its passing reference to *Klein* does not create a conflict among the opinions of the Ninth Circuit; and, in any event, the dissent in *Barcellos & Wolfsen* addressed a separation of powers issue not before the court of appeals in this case: the scope of Congress' powers to alter a "judgment that ha[s] fixed the rights of the parties." *Id.* at 830 (Fernandez, Circuit Judge, dissenting). Finally, the two opinions of the United States Court of Appeals for the District of Columbia that the Solicitor cites, *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987), and *National Juvenile Law Center, Inc. v. Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984), address Congress' powers to limit the jurisdiction of the courts to hear constitutional claims, another separation of powers issue that was not before the court of appeals in this case. In sum, while the *Klein* opinion addressed several facets of the multi-faceted separation of powers doctrine, there is no conflict among the courts of appeal over the one facet of *Klein* that applies to this case: that the separation of powers doctrine precludes Congress from directing the courts how to apply an existing law in a pending case without changing that law.

The Solicitor offers this Court no basis for granting the petition for a writ of certiorari on the grounds that the court of appeals decision conflicts with the opinions of this Court or other courts of appeal. *See* Supreme Court Rule 10.1(a).

3. The Court of Appeals Decision Correctly Applies Uncontroversial Constitutional Principles to a Particular and Unique Set of Facts.

The Solicitor also asserts that "[i]n its haste to strike down Section 318(b)(6)(A) as unconstitutionally prescribing a rule of decision, the court of appeals misapprehended the statutory terms," Cert. Pet. at 16-17, and improperly "invok[ed] the 'doctrine disfavoring repeals by implication,' " *id.* at 18. The Solicitor is wrong on both counts.

As the Solicitor correctly notes, section 318 did require the Forest Service and Bureau of Land Management to attempt to sell certain quantities of timber during fiscal year 1990, *see* section 318(a) (Cert. Pet., App. F at 43a-44a); *GPA II*, 752 F. Supp. at 970-72. It also established guidelines for identifying these timber sales, *see* sections 318(b)(1) to (5) (Cert. Pet. App. F at 44a-47a), and barred judicial review of the guidelines in these subsections, *see* section 318(b)(6)(A) (Cert. Pet., App. F at 47a-48a) (second sentence); *Seattle Audubon Society v. Robertson*, 914 F.2d at 1317 & n. 4 (Cert. Pet., App. A at 17a). *But*, as the Ninth Circuit concluded, section 318 did not amend or repeal the National Environmental Policy Act, 42 U.S.C. § 4332, the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703, or any of the other statutes at issue in these cases. *Seattle Audubon Society v. Robertson*, 914 F.2d at 1316-17 (Cert. Pet., App. A at 14a-16a).

The Solicitor apparently disagrees with this conclusion for the petition states that section 318 "amounted to nothing other than a 'temporary modification of the environmental laws.' " Cert. Pet. at 18 (citation omitted). The Solicitor, however, offers no explanation of how section 318 accomplished this modification. There was certainly

no express language of repeal or modification for thes general environmental laws anywhere in section 318 or sub section (b)(6)(A).[13] Nor has the Solicitor identified a conflic between implementation of these general laws and compli ance with the guidelines of sections 318(b)(1) to (5), as woul be necessary to even suggest a repeal by implication. *Se* Cert. Pet. at 17-18. Instead, as the court of appeals found, an as the Solicitor does not dispute, some subsections of sectio 318 "add additional requirements" to those of the existin laws at issue in these cases. 914 F.2d at 1316 (Cert. Pet., App A at 13a) (footnote omitted).

More importantly, the Solicitor ignores entirely a crit ical aspect of the court of appeals holding in this case After noting that some subsections of section 318 "ad additional requirements" to the existing laws, and notin that it must uphold a statute if it is fairly possible t "interpret [it] in a manner that renders it constitutionall valid," *id.*, the court ruled that although:

> Congress could possibly have written a valid statute, [this] does not mean that we can "fairly" interpret the statute that Congress in fact enacted as constitutionally valid. The language of section 318 is clear: Congress not only legislated a forest management plan, §§ 318(b)(3), (b)(5), but also directed the courts to find that that plan satisfied the environmental laws underlying the ongoing litigation. § 318(b)(6)(A). In doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a cause in a particular way, without

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[13] Section 318(f) does repeal the application of these gen eral laws to a limited and specific set of timber sales, *se* section 318(f) (Cert. Pet., App. F at 52a) (quoted in note 5 *supra*), but this language does not affect the plaintiffs' claim generally, nor does the Solicitor suggest otherwise.

> changing the underlying laws, as it unquestionably cannot do.

Id. (Cert. Pet., App. A at 15a-16a) (citations and footnotes omitted). The language of section 318(b)(6)(A) is, as the court of appeals noted, clear and direct. It neither expressly nor by implication repeals the environmental laws at issue in this case. To rule otherwise would have required the court of appeals to rewrite the statute for Congress, a task the Constitution prohibited it from undertaking.[14] The Solicitor, however, apparently would have this Court substitute a judicial version of section 318(b)(6)(A) that passes constitutional muster for the language Congress actually drafted and enacted.[15] The court of appeals cannot be faulted for refusing such an invitation and this Court should not accept it now.

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[14] Contrary to the Solicitor's claim, the court of appeals did not construe *Klein* as prohibiting Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions. *See* Cert. Pet. at 23, 24 (citing cases). Instead, the court of appeals simply ruled that the plain and unambiguous language of section 318(b)(6)(A) did not change the substantive law in the underlying litigation in this case. 914 F.2d at 1316 (Cert. Pet., App. A at 15a-16a).

[15] The court of appeals did note, after it had properly concluded that section 318 directed the court in a pending case to reach a particular result, that "*even if* we could interpret section 318 as a temporary repeal of the environmental laws at issue in the underlying litigation, then section 318 would amount to an implied partial repeal of the environmental statutes." 914 F.2d at 1317 (Cert. Pet., App. A at 16a) (emphasis added).

Rather than "invoking the doctrine against implied repeals" in order to construe section 318 as violating the Constitution's separation of powers doctrine, as the Solicitor claims, the court of appeals was simply noting that the construction urged by the government was *not only* contrary to the plain language of section 318, but also would require the court to violate the doctrine against implied repeals.

The court of appeals correctly and carefully read th actual language that Congress enacted in sectio 318(b)(6)(A) and properly applied uncontroversial consti tutional principles to that language. There is nothing i these actions of the court of appeals that supports grant ing the Solicitor General's petition for a writ of certiorar in this case.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

DATED: This 11th day of May, 1991.

Respectfully submitted,

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APPENDICES TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

A *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Memorandum Decision and Injunction, (W.D. Wash. May 23, 1991)..... 1a

B *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Order on Motions for Summary Judgment and for Dismissal (W.D. Wash. March 7, 1991)..... 38a

C *Seattle Audubon Society, et al. v. Robertson, et al.*, 9th Cir. No. 90-35774, Opinion, (April 26, 1991). 66a

D *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Order on SAS' Renewed Motion for Summary Judgment and Permanent Injunction re Six Timber Sales (W.D. Wash. May 24, 1991).... 85a

E *Portland Audubon Society, et al. v. Lujan, et al.*, No. 87-1160-FR, Opinion, (D. Ore. May 8, 1991).....88a

F H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. (1989).....105a

G *Seattle Audubon Society, et al. v. Evans, et al.*, No. C89-160-WD, Order on Motions Heard on December 5, 1990 (W.D. Wash. Dec. 18, 1990).....126a

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. JOHN L. EVANS, et al., Defendants. and WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Intervenors.	NO. C89-160WD MEMORANDUM DECISION AND INJUNCTION FILED MAY 23 1991

I.

INTRODUCTION

On March 7, 1991, the court entered an order on summary judgment declaring unlawful a proposal of defendants John L. Evans, et al. (collectively the "Forest Service") to log northern spotted owl habitat in national forests located in Washington, Oregon, and Northern California without complying with requirements of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq*. Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991) (Dkt. # 824). On the basis of that order plaintiffs Seattle Audubon Society, et al. (collectively "SAS") have moved for a permanent injunction prohibiting the sale of logging rights in additional

spotted owl habitat areas until the Forest Service com plies with NFMA and its regulations by adopting sta dards and guidelines to assure that a viable population the species is maintained in the forests. The Forest Se vice proposes a different injunction, one that would pe mit, in the interim, additional sales in owl habitat if the are consistent with the recommendations of the Report the Interagency Scientific Committee to Address the Con servation of the Northern Spotted Owl ("ISC Report" issued in April 1990. Intervenors Washington Contra Loggers Association, et al. (collectively "WCLA") suppo the Forest Service's proposal. The two sides agree that th court should set a date for the Forest Service to adopt plan to assure the owl's viability.

The court granted WCLA's request for an evidentiar hearing on the scope of injunctive relief, and all parties request for prehearing discovery. *See Charlton v. Estate Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). An order issue April 1, 1991, specified the subjects for the hearing. Orde Setting Evidentiary Hearing re Injunctive Relief (Dk # 867). The hearing began on April 30 and ended on Ma 9, 1991. All parties presented evidence, rested their cases and gave oral argument through counsel. The evidenc admitted, the arguments and briefs, and the proposed findings submitted by counsel have been fully consid ered.

II.

HISTORY OF THIS CASE AND RECENT ADMINISTRATIVE PROCEEDINGS

The national forests are managed by the Forest Service under NFMA. Regulations promulgated under that statute provide that

> [f]ish and wildlife shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

36 C.F.R. § 219.19. A viable population is "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." *Id.* To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals. *Id.*

Since not every species can be monitored, "indicator species" are observed as signs of general wildlife viability. *Id.* § 219.19(a)(1). The northern spotted owl is an indicator species.

While having these conservation duties, the Forest Service is also charged with managing these lands to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefit in an environmentally sound manner." *Id.* § 219.1(a). *See generally* C. Wilkinson & H. Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985).

In recent years logging and development have steadily reduced wildlife habitat in the Pacific Northwest. At the same time many local mills have experienced log

shortages. The result is an intensified struggle over t
future of the national forests.

In 1989 SAS and WCLA sued the Forest Service
this court, challenging the legality of an administrati
decision adopting standards and guidelines for managi
northern spotted owl habitat in the national forests. T
administrative decision was set out in a Record of De
sion ("ROD") issued on December 8, 1988, and an acco
panying Final Supplement to the Environmental Impa
Statement For an Amendment to the Pacific Northwe
Regional Guide ("FSEIS"). For opposite reasons, the tv
sets of plaintiffs challenged the Forest Service's pl
under NFMA and the National Environmental Policy A
("NEPA"), 42 U.S.C. § 4321 *et seq.*, and their implemer
ing regulations.

The court consolidated the two cases, ordered the
expedited, and set a final hearing date for June 13, 198
On March 24, 1989, the court issued a temporary injun
tion deferring specified timber sales in Washington an
Oregon for what then appeared to be a few weeks unt
the final hearing. Order on Motions for Preliminar
Injunction and for Change of Venue at 2 (Mar. 24, 198
(Dkt. # 97).

On May 11, 1989, the Forest Service moved for a sta
of all proceedings pending completion of a conferenc
process between itself and the Fish and Wildlife Servic
("FWS"). In a separate case, Judge Zilly of this distric
had ruled that the FWS was acting arbitrarily and capr
ciously, and contrary to law, in failing to list the spotte
owl as endangered or threatened under the Endangere
Species Act ("ESA"), 16 U.S.C. § 1531 *et seq. Norther*

Spotted Owl (Strix Occidentalis Caurina) v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). On April 25, 1989, having reconsidered in response to Judge Zilly's order, the FWS announced its intent to list the owl as "threatened" under the ESA. SAS and WCLA agreed that a stay of the present case was warranted so that the two agencies could consult. The Forest Service proposed a temporary ban on timber sales containing forty or more acres of spotted owl habitat. This was adopted by order of May 26, 1989. Order on Motion for Stay (Dkt. # 173).

The Forest Service said it would present within thirty days interim measures to protect spotted owl habitat during the FWS listing process. It did not do so. Instead it moved on August 24, 1989, for leave to go forward with eleven timber sales that had been deferred. At that point there was no spotted owl management plan in effect. The court on its own motion lifted the stay and ordered an expedited final hearing in these cases. Order Lifting Stay, etc. (Sept. 12, 1989) (Dkt. # 226).

Congress in the meantime was debating legislation which would provide a short-term supply of national forest and Bureau of Land Management ("BLM") timber to mills in Washington and Oregon without having the usual type of agency action subject to judicial review. The final result was section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"), which became law on October 23, 1989. The Congressional conference committee presented the bill as necessary "because of the failure of the agencies [i.e., the Forest Service and the BLM] to take steps on their own to resolve these matters in a manner

which could have prevented the current situation." H.
Conf. Rep. No. 264, 101st Cong., 1st Sess., *reprinted in* 1
Cong. Rec. H6411 (daily ed. Oct. 2, 1989).

Section 318 included the following provisions, amor
others:

– It directed the Forest Service and the BLM to off
specified quantities of timber for sale in fiscal years 19
and 1990. Subsection (a).

– It contained restrictions on the cutting of "ecolog
cally significant old growth forest stands" except as ne
essary to meet the sales quota, barred logging in certai
"spotted owl habitat areas," and adopted temporaril
(with a few modifications) the standards and guideline
proposed in the Forest Service's December 1988 ROD
Subsections (b)(1), (2) and (3).

– It stated that Congress "determines and directs
that management of the forests for fiscal years 1989-9
according to its provisions "is adequate consideration fo
the purpose of meeting the statutory requirements tha
are the basis for [the present cases and a similar cas
pending in the District of Oregon]." Subsection (b)(6)(A

– It directed the Forest Service to prepare a new
spotted owl plan and have it in place by September 3
1990:

> The Forest Service is directed to review and revise as appropriate the decision adopted in the December 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines

> for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December 1988 decision determined to be necessary by the Forest Service are to be completed and in effect not later than September 30, 1990.

Subsection (b)(6)(B).

On November 6, 1989, this court vacated the preliminary injunction because section 318 had become law as to 1989-90 timber sales. The court construed the statute as a temporary amendment of the environmental laws, and therefore rejected SAS's constitutional challenge to subsection (b)(6)(A). Memorandum Decision Re Constitutionality (Nov. 14, 1989) (Dkt. # 278).

An interlocutory appeal was certified under 28 U.S.C. § 1292(b). The court of appeals declined to stay the application of section 318 pending appeal.

Over the next several months the parties proceeded under section 318. SAS brought a series of challenges to timber sales under the standards of the temporary statute. On May 11, 1990, this court entered an order on the first such challenge, enjoining the Cowboy sale in the Umpqua National Forest. (Dkt. # 389). On appeal by the Forest Service, the court of appeals affirmed in an unpublished opinion filed August 27, 1990. *Seattle Audubon Soc'y v. Robertson*, No. 90-35519 (9th Cir. 1990).

Other challenges to 1990 timber sales followed the district court decision on the Cowboy sale. The court enjoined three sales on the basis that the Forest Service had not complied with section 318; the agency withdrew

two other sales after a motion for summary judgment w
filed; and the court found for the Forest Service as to o
sale. (Dkt. ## 459, 608, 677). No party appealed fro
these rulings.

On September 18, 1990, the court of appeals issued
opinion, and on October 30 an amended opinion, findi
the first sentence of section 318 (b)(6)(A) unconstitution
under the separation of powers doctrine. *Seattle Audub*
Soc'y v. Robertson, 914 F.2d 1311 (9th Cir. 1990).

The appeal of the Ninth Circuit concerned the part
section 318 in which Congress "determines and direct
that management of the forests in 1989-90 according
subsections (b)(3) and (b)(5) "is adequate considerati
for the purpose of meeting the statutory requirement
underlying the cases in this district and in Oregon. T
court of appeals ruled that this provision was not
temporary amendment of the environmental laws b
rather an unconstitutional attempt to adjudicate rath
than legislate. The requirements of section 318 were th
held to be in addition to, and not in lieu of, those of t
general environmental statutes. The decision did n
affect the other parts of section 318.

While the above-described events were taking plac
federal administrative agencies took further actio
regarding the spotted owl. The Interagency Scientif
Committee was established in 1989 by agreement of th
Forest Service, the Bureau of Land Management of th
Department of the Interior, the Fish and Wildlife Servic
and the National Park Service. Its mission was "
develop a scientifically credible conservation strategy fo
the northern spotted owl in the United States." Hearin

Exhibit ("Exh.") 1 at 1. On April 2, 1990, the ISC issued its report. *See* 55 Fed. Reg. 40412, 40413; Report of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl, *A Conservation Strategy for the Northern Spotted Owl* (U.S.D.A., *et al.* 1990) (Exh. 1).

In June 1990 the Fish and Wildlife Service, having completed its listing process, listed the owl as a threatened species under the Endangered Species Act. *Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26114.

The Forest Service did not comply by the deadline of September 30, 1990 – or at all – with section 318's requirement that it adopt a revised plan to ensure the owl's viability.

On September 28, 1990, the Department of Agriculture gave notice that the Forest Service was vacating the December 1988 Record of Decision, and that it would manage timber sales in a manner "not inconsistent with" the ISC Report. 55 Fed. Reg. 40413 (1990). This announcement was made without notice, hearing, environmental impact statement, or other rule-making procedures.

On December 18, 1990, this court enjoined the Forest Service from proceeding with twelve proposed fiscal year 1990 timber sales because the agency had failed to comply with NFMA by having any standards and guidelines for spotted owl viability in place. The order reaffirmed what the court of appeals had already held, i.e., that section 318 did not displace NFMA. Order on Motions Heard December 5, 1990 (Dec. 18, 1990) (Dkt. # 757). Leave was granted to the Forest Service to pursue a newly-raised argument that its duty under NFMA to

maintain the species ended when the listing under E occurred. *Id.*

On February 26, 1991, Judge Zilly ruled in N C88-573Z that the FWS had again failed to comply w the law, stating:

> Upon the record presented, this Court finds the [Fish and Wildlife] Service has failed to discharge its obligations under the endangered Species Act and its own administrative regulations. Specifically, the Service acting on behalf of the Secretary of the Interior, abused its discretion when it determined not to designate critical habitat concurrently with the listing of the northern spotted owl, or to explain any basis for concluding that the critical habitat was not determinable. These actions were arbitrary and capricious, and contrary to law. 5 U.S.C. § 706.

Northern Spotted Owl (Strix Occidentalis Caurina) v. Luja 758 F. Supp. 621, 629 (W.D. Wash. 1991).

The Forest Service's argument in this case that it w relieved of its NFMA duty to plan for the spotted ow viability once the species was listed by the FWS "threatened" was rejected in an order entered March 1991. Order on Motions for Summary Judgment and f Dismissal (Dkt. # 824.) The court found not only that t argument was insupportable, but that "the Forest Servi has understood at all times that its duties under NFM and ESA are concurrent." *Id.* at 15. Accordingly, summa judgment was granted determining that the Forest Se vice's proposal to log spotted owl habitat without co plying with NFMA was unlawful.

WCLA's complaint was dismissed as moot, witho opposition, because the 1988 ROD which it challenge

had been withdrawn. *Id.* at 25. WCLA was then allowed to intervene in the SAS action, and thus remains a party. Order Granting Motion for Leave to Intervene (Apr. 1, 1991) (Dkt. # 868).

III.

AMICUS CURIAE BRIEF OF SISKIYOU COUNTY

On May 16, 1991, a week after the evidentiary hearing ended, the Board of Supervisors and Office of Education of Siskiyou County, California ("Siskiyou County"), sought leave to file a brief *amicus curiae*. Leave was granted, the brief has been filed, and SAS has responded.

Siskiyou County's brief is untimely but has nevertheless been fully considered on the merits. It argues that SAS has no standing to seek relief relating to national forests in Northern California, as distinguished from those in Washington and Oregon; and that, if SAS does have standing, any injunctive relief (even in the form proposed by the Forest Service) should exclude Northern California.

The Forest Service's *Federal Register* notice that the court found to be an unlawful proposal to log owl habitat without compliance with NFMA applied to four national forests in Northern California (in Forest Service Region 5) as well as to thirteen in Oregon and Washington (in Region 6). 55 Fed. Reg. 40412, 40414 (1990). SAS's amended complaint alleges the illegality of the proposed timber sales in the forests of Northern California as well as in those of Washington and Oregon. Second Amended Complaint at ¶¶ 8, 18, 23, and First Claim for Relief at ¶ 1

(Dkt. # 731). The order granting summary judgment ruled that the "agency's failure to date to comply, or begin compliance, with NFMA requirements is arbitrary and capricious, and not in accordance with law." Order of March 7, 1991 at 26 (Dkt. # 824). The proposal to log owl habitat in the four Northern California forests without NFMA compliance was not excepted from the ruling.

As to standing, SAS has challenged an agency action that affects a bird threatened throughout its range. The issue is not limited to specific metes and bounds. As the ISC has noted: "Spotted owls, after all, are oblivious to our political and institutional boundaries." Exh. 1 at 41. SAS's standing as a party "adversely affected or aggrieved" has already been established. See Order of March 7, 1991 at 8 (Dkt. # 824); Declaration of Bonnie Phillips-Howard (Jan. 14, 1991) (Dkt. # 783); *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185-86 (1990). SAS's motion for leave to file additional declarations showing standing is not necessary, but is granted in order to complete the record.

As to the geographic scope of the injunction, Siskiyou County's argument is that the spotted owl's viability will not be harmed by habitat destruction in Northern California because habitat develops faster there – on the order of fifty or eighty years rather than perhaps a hundred and fifty years farther north. However, the FWS has listed the owl as threatened in Northern California as well as elsewhere. 55 Fed. Reg. 26114. The ISC has identified "areas of special concern" in Northern California, and, even under its recommended plan, estimates only a "low" or "moderate" prospect of viability in three of the area's

four "physiographic provinces" in fifty years. Exh. 1 at 68, 386.

Nothing has been presented that would justify excluding the four Northern California forests, either on biological or economic grounds, from injunctive relief, regardless of whether SAS's or the Forest Service's proposed order is adopted.

IV.

STANDARDS COVERING INJUNCTIVE RELIEF

The standards governing whether and to what extent a permanent injunction should issue are summarized in *Friends of the Earth v. Hall*, 693 F. Supp. 904, 948 (W.D. Wash. 1988):

> In determining whether to issue an injunction where statutory violations have occurred, the court must engage in a two part analysis. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 107 S.Ct. 1396, 1402-04, 94 L.Ed.2d 542 (1987); *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). First, the court must determine whether the statute restricts the court's equity jurisdiction, that is whether the statute would either require or preclude issuance of an injunction to remedy a violation. *Village of Gambell*, 107 S.Ct. at 1403; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). If the court finds that no such limitation can be found either in the statutory language itself or as a necessary and inescapable inference of the statutory text, then the court must engage in traditional equity balancing to determine the appropriateness of an injunction. *Village of Gambell*, 107 S.Ct. at 1402; *Save the Yaak*, 840 F.2d at 722.

Nothing in NFMA alters the court's equity jurisdiction. The traditional "basis for injunctive relief in the federal courts have always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo, supra,* 456 U.S. at 312.

In *Village of Gambell, supra,* 480 U.S. at 545, the Court stated:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

However, the party seeking relief must show not merely a statutory violation, but a probability of injury serious enough to outweigh any adverse effects from the issuance of an injunction. *Id.*

V.

FINDINGS OF FACT

The evidentiary hearing held from April 30 to May 9, 1991, provided a wealth of information. Expert testimony of high quality from biologists, economists, and others was presented by both sides. From the evidence admitted at the hearing the court makes and enters the following findings of fact:

A. Background Findings

1. The fate of the spotted owl has become a battleground largely because the species is a symbol of the remaining old growth forest. As stated in the ISC Report:

> Why all the fuss about the status and welfare of this particular bird? The numbers, distribution, and welfare of spotted owls are widely believed to be inextricably tied to mature and old-growth forests. Such forests have been significantly reduced since 1850 (mostly since 1950) by clearing for agriculture, urban development, natural events such as fire and windstorms, and most significantly, by logging in recent decades. Nearly all old growth has been removed on private lands. Most of the remainder is under the management of the BLM, FS, and NPS on Federal lands. As its habitat has declined, the owl has virtually disappeared from some areas and its numbers are decreasing in others.

Exh. 1 at 7.

2. An old growth forest consists not just of ancient standing trees, but of fallen trees, snags, massive decaying vegetation, and numerous resident plant and animal species, many of which live nowhere else.

3. A great conifer forest originally covered the western parts of Washington, Oregon, and Northern California, from the Cascade and Coast mountains to the sea. Perhaps ten percent of it remains. The spaces protected as parks or wilderness areas are not enough for the survival of the northern spotted owl.

4. The old growth forest sustains a biological community far richer than those of managed forests or tree

farms. As testified by Dr. William Ferrell, a forest ecologist:

> The most significant implication from our new knowledge regarding old-growth forest ecology is that logging these forests destroys not just trees, but a complex, distinctive, and unique ecosystem.

Exh. 12 at 6.

5. The remaining old growth stands are valued also for their effects on climate, air, and migratory fish runs, and for their beauty. A 1984 Forest Service document summed up the controversy:

> There are at least three main reasons cited for maintaining old growth: wildlife and plant habitat, ecosystem diversity, and preservation of aesthetic qualities. Those opposed to the retention of old growth are primarily concerned with economic factors and urge rapid conversion of the existing old growth to managed forests of productive, young age classes.

Pacific N.W. Region, United States Forest Service, United States Dep't of Agric., *Regional Guide for the Pacific Northwest Region* at p. 3-40 (May 1984), attached as Exh. F to Second Declaration of Corrie Yackulic (July 26, 1990) (Dkt. # 445).

6. Through most of the country's history there was little or no logging in the national forests. Intensive logging began with World War II and has accelerated.

7. NFMA was adopted in 1976, after three decades of heavy logging, in the hope of serving both wilderness and industry values. Senator Humphrey of Minnesota, a sponsor of the act, stated:

> The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, and fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions.

122 Cong. Rec. 5619 (daily ed. Mar. 5, 1976).

8. Despite increasing concern over the environment, logging sales by the Forest Service have continued on a large scale. Timber harvests in the national forests in Washington and Oregon ranged from 4.448 billion to 5.082 billion board feet per year in 1985 through 1989, amounting to between 30% and 33% of the total harvest in those states in those years.

9. Some major firms in the Pacific Northwest have extensive private forests and need little or no wood from public sources. Many small mills and logging companies depend in whole or in part on federal timber.

10. Mill owners and loggers, and their employees, especially in small towns, have developed since World War II an expectation that federal timber will be available indefinitely, and a way of life that cannot be duplicated elsewhere.

11. The region's timber industry has been going through fundamental changes. The most important is modernization which increases productivity and reduces the demand for labor (i.e., the jobs available). There have also been recent changes in product demand, in competition from other parts of the country and the world, and in the export of raw logs for processing in the Far East. The painful results for many workers, and their families and

communities, will continue regardless of whether owl habitat in the national forests is protected.

B. Statutory Violations

12. The records of this case and of No. C88-573Z show a remarkable series of violations of the environmental laws. The Forest Service defended its December 1988 ROD persistently for nearly two years. Congress was persuaded in 1989 to adopt most of the ROD standards as a temporary measure in section 318. But in the fall of 1990 the Forest Service admitted that the ROD was inadequate after all – that it would fail to preserve the northern spotted owl. In seeking a stay of proceedings in this court in 1989 the Forest Service announced its intent to adopt temporary guidelines within thirty days. It did not do that within thirty days, or ever. When directed by Congress to have a revised ROD in place by September 30, 1990, the Forest Service did not even attempt to comply. The FWS, in the meantime, acted contrary to law in refusing to list the spotted owl as endangered or threatened. After it finally listed the species as "threatened" following Judge Zilly's order, the FWS again violated the ESA by failing to designate critical habitat as required. Another order had to be issued setting a deadline for the FWS to comply with the law.

13. The reasons for this pattern of behavior were made clear at the evidentiary hearing.

Dr. Eric Forsman, a research wildlife biologist with the Forest Service, testified, in regard to the 1988 ROD and other Forest Service plans for the spotted owl that preceded the ISC Report:

> Q. Were you satisfied at the time with the results of those previous works?
>
> A. No. On all of those plans, I had considerable reservations for a variety of reasons. But primarily because in every instance, there was a considerable – I would emphasize considerable – amount of political pressure to create a plan which was an absolute minimum. That is, which has a very low probability of success and which has a minimum impact on timber harvest.

Hearing Transcript ("Tr.") at 801-02.

George M. Leonard, associate chief of the Forest Service, testified that the agency experts began in early 1990 the work needed to have a revised plan in place by September 30 of that year, as Congress mandated in section 318. But the Secretaries of Agriculture and Interior decided to drop the effort. The public was not told of this decision to ignore what the law required. Mr. Leonard testified:

> THE COURT: When was it in 1990 that you ceased your effort to meet the September 30 deadline of Section 318?
>
> A. When the Secretary of Agriculture and Secretary of Interior began discussion, they appointed an interagency team to look at options to the Interagency Scientific Committee report and whatnot. So, it was – in effect, it was escalated above the Forest Service to the secretarial level.
>
> THE COURT: And when in 1990 did that happen?
>
> A. I think it was about in May, but I don't know precisely the date.

THE COURT: Was any public announcement made at any time before October 1990 to the effect that the Forest Service was not going to publish a revised ROD by the end of September?

A. No, there was not.

THE COURT: Was there any reason that you know of that that wasn't announced?

A. It was the – the Secretary-level committee was working throughout the summer looking at options. And the thought was that they would develop an option and that would be the basis for the announcement.

THE COURT: But they never did?

A. They never did, no.

Tr. at 383-84.

The Forest Service had been expressly directed by Congress in section 318 to consider the ISC recommendations in arriving at the ROD to be issued by September 30, 1990. Dr. Jack Ward Thomas, team leader of the ISC, testified to what happened after his committee's report was issued:

Q. After your report was finalized, was it subject to any additional review?

A. Yes, it was.

Q. What occasioned that subsequent review?

A. After the initial release of the report, there was a political decision made by the administration to appoint a cabinet-level review team that would examine the report, a task force that would examine the report, with the idea of

> seeing if there was some alternative course of action that would be less dramatic economically and socially.

Tr. at 985-86.

14. Had the Forest Service done what Congress directed it to do – adopt a lawful plan by last fall – this case would have ended some time ago.

15. More is involved here than a simple failure by an agency to comply with its governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic refusal by the Forest Service and the FWS to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.

C. Time Needed for Forest Service to Comply with NFMA

16. The Forest Service seeks an allowance of fifteen more months, or until July 31, 1992, to prepare a new ROD and environmental impact statement. Another month would have to pass before the ROD could take effect. The agency thus proposes to accomplish by August 31, 1992, the step that Congress directed it to complete by September 30, 1990. The sixteen months, according to the testimony of Mr. Leonard, "would include several months for analyzing comments and preparing the final document." Tr. at 368. But the agency declines to make a firm prediction about even this extended timetable. Mr. Leonard testified that two or three years might go by

before his agency reached a decision, depending on future developments such as FWS's promulgation of a species recovery plan. *See* Tr. at 370-71, 374.

17. Further delays of this magnitude are neither necessary nor tolerable.

18. In adopting section 318, which became law on October 23, 1989, Congress directed the Forest Service to have a revised spotted owl plan in effect eleven months later. Subsection (b)(6)(B). In doing so Congress made clear that it expected full compliance. Representative AuCoin, a supporter of the legislation, stated:

> I want to put the Forest Service on notice right now, Madam Speaker, that we expect the Forest Service to complete, to adopt, and to implement new forest plans in the coming year. Thirteen years have passed since the enactment of the National Forest Management Act; 4 years have passed since the deadline for completion of initial forest plans. We should not have to be here on the floor today to recover this agency's mistakes, but yet we are here.

135 Cong. Rec. H6506 (daily ed. Oct. 3, 1989).

19. According to Mr. Leonard's testimony, the Forest Service began work in early 1990 to met the congressional deadline. It had been directed in section 318 to consider the forthcoming ISC Report. The report came out in April. Work was then stopped by a decision made at the cabinet level. Tr. at 381-84.

20. The Forest Service now has advantages it lacked in early 1990. Much of the research and analysis had been done. The ISC Report, a thorough treatment, has been in existence for more than a year. The agency also has the

benefit of an opinion letter from the FWS dated April 10, 1991, commenting at length on the ISC strategy and giving recommendations. Exh. A-7.

21. With the knowledge at hand, there is no reason for the Forest Service to fail to develop quickly a plan to ensure the viability of the spotted owl in the national forests. Coordination with the FWS need not be an obstacle; the agencies have coordinated their efforts on other species, and can on this one. The job could be completed in less time than was allowed by Congress in 1989 when it adopted section 318. However, equal time of eleven months will be afforded. The time will run from April 1, 1991, when the court ordered the agency to proceed diligently in compliance with NFMA. (Dkt. # 867). A new ROD with accompanying EIS will thus be due on February 3, 1992, to take effect on March 5, 1992. The net result is that the agency has a seventeen-month extension to complete the job that Congress mandated be done by September 30, 1990.

D. Probability of Irreparable Harm

22. The northern spotted owl is now threatened with extinction. The ISC Report states:

> We have concluded that the owl is imperiled over significant portions of its range because of continuing losses of habitat from logging and natural disturbances. Current management strategies are inadequate to ensure its viability. Moreover, in some portions of the owl's range, few options for managing habitat remain open, and available alternatives are steadily declining throughout the bird's range.

> For these reasons, delay in implementing a conservation strategy cannot be justified on the basis of inadequate knowledge.

Exh. 1 at 1.

The FWS has found that the owl is threatened *throughout* its range. 55 Fed. Reg. 26114.

23. The population of northern spotted owls continues to decline. "We're going to have to arrest that decline and reverse it," as Dr. Thomas testified. Tr. at 1007.

24. "Spotted owl habitat," also called "suitable habitat," is defined as follows by FWS:

> Suitable owl habitat has moderate to high canopy closure (60 to 80 percent); a multi-layered, multi-species canopy dominated by large (> 30 inches in diameter at breast height (dbh) overstory trees; a high incidence of large trees with various deformities e.g., large cavities, broken tops, dwarf-mistletoe infections, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly.

55 Fed. Reg. 26114, 26116 (1990).

The same definition is used in the ISC Report (Exh. 1 at 164), and is adopted for purposes of this order.

25. The Forest Service estimates that an additional 66,000 acres of spotted owl habitat would be destroyed if logging went forward to the extent permitted by the ISC Report over the next sixteen months. That would be in addition to about 400,000 acres of habitat logged in the seven years since the agency began preparing these

guidelines, all without having a lawful plan or EIS for the owl's management in place.

26. The ISC Report recommends standards and guidelines aimed at assuring the owl's long-term viability. The strategy contains seven major components: four categories of habitat conservation areas ("HCAs), two different spacing requirements between HCAs, and the 50:11:40 rule. Exh. 1 at 28-29, 283-343 (Appendices O, P & Q).

27. No timber management activities may take place in HCAs. Category 1 HCAs are designed to hold twenty or more pairs of spotted owls. Exh. 1 at 28, 315 (Appendix Q). Category 2 HCAs are designed to hold between two and nineteen pairs. *Id.* Category 3 HCAs are placed around single pairs of owls in areas of special concern identified by the ISC. *Id.* at 332 (Appendix Q). Category 4 HCAs are designed for the retention of eighty acres of suitable habitat around core areas to provide for connectivity in the forest matrix and future nest sites. *Id.* at 29, 315.

28. Category 1 HCAs can be no more than twelve miles, Category 2 HCAs no more than seven miles, from the nearest neighbor. Exh. 1 at 26 and 320.

29. The ISC's standards and guidelines also specify the type of habitat to be found in the intervening landscape, via the 50:11:40 rule. That rule requires that at least fifty percent of the forested landscape outside HCAs be maintained in stands of timber with an average diameter at breast height of eleven inches or greater, and at least 40% canopy closure. Exh. 1 at 29, 309-10.

30. The ISC's strategy is map-based. Exh. 1 at 29. Using the standards and guidelines outlined above, the ISC has delineated the HCAs on the ground. *Id.* Maps showing the delineation of Category 1 and 2 HCAs accompany the report. Exh. 1, Maps.

31. The ISC Report has been described by experts on both sides as the first scientifically respectable proposal regarding spotted owl conservation to come out of the executive branch. However:

(a) To have a chance of success, the strategy would have to be adopted and followed by the agencies concerned. So far it has not been adopted by any agency. The BLM, which manages extensive old growth forests, has declined to implement the strategy in full. This causes concern even to the experts relied upon by the Forest Service. *See, e.g.*, the testimony of Dr. Mark Boyce at Tr. 968-69. Even temporarily, while a conservation plan is being adopted, the BLM will not comply in full with the 50:11:40 rule. On this score FWS has stated in its April 11, 1991, opinion letter:

> While the Forest Service has agreed to implement both of the major components of the ISC Conservation Strategy, (i.e., establishment and protection of habitat conservation areas and management of areas outside HCAs by the 50-11-40 rule (Thomas et al. 1990a)), the Bureau of Land Management (Bureau) has not made a similar commitment. Specifically, the Bureau has not agreed to fully manage the forest matrix to comply with the 50-11-40 rule. The Bureau's failure to fully implement the strategy may have significant consequences for the spotted owl because of the strategic location of Bureau lands between provinces and within areas of concern,

> and because much of their land lies within checkerboard ownership. The expected success of the ISC Conservation Strategy was based on full implementation of the recommendations on all Federal lands, beginning with the FY 1991 timber sale program.

Exh. A-7 at 14.

There is nothing in the record to refute these concerns over the BLM's position. The testimony of Joseph Lint, a BLM Wildlife biologist, relied upon by the Forest Service and WCLA, does not contain any opinion on the subject.

(b) The ISC proposal has not been put to the test of pubic comment and hearings.

(c) The ISC strategy may or may not prove to be adequate. While it is endorsed by well-qualified scientists, it is criticized by others, equally well-qualified, as over-optimistic and risky. The Fish and Wildlife Service has stated that it "may not represent a permanent, long-term solution for conservation or recovery of the spotted owl, nor assure compliance with the [ESA] and National Forest Management Act." Exh. A-7 at 15.

(d) The ISC Report calls for diligent monitoring to sample the results once the program begins:

> A comprehensive monitoring scheme that covers all land ownerships should be developed. . . . [W]e believe that developing and instituting a fully coordinated program of management, monitoring, research, and development, which operates across all of the landscape

> that makes up owl habitat, is both essential and overdue.

Exh. 1 at 41.

No monitoring scheme exists, although members of the ISC expected one to be in place by now.

32. To log tens of thousands of additional acres of spotted owl habitat before a plan is adopted would foreclose options that might later prove to have been necessary. The FWS has stated:

> We share the ISC's concern that few options remain open for managing spotted owl habitat and that available management alternatives are steadily declining throughout the range (Thomas et al. 1990a). Adoption of the conservation strategy on an interim basis further reduces alternative conservation options by concentrating timber harvest in spotted owl habitat outside the HCAs, fragmenting remaining contiguous blocks of habitat which lay outside HCAs, and impacting the productivity of spotted owl pairs in the forest matrix by further reducing the amount of suitable habitat within their home ranges. Until a permanent recovery plan is developed and implemented, future management options should be preserved by providing protection for spotted owl pairs and resident singles both in and out of HCAs, and by reserving the remaining contiguous blocks of spotted owl habitat.

Exh. A-7, p. 14.

33. Mr. Leonard of the Forest Service has testified that the agency will consider the alternative of preserving the remaining spotted owl habitat in the national forests.

Tr. at 385-86. That alternative would be lost if extensive logging of habitat were to go forward now.

34. A review of proposed sales by the FWS would not be a substitute for compliance with NFMA. The Forest Service is required by law to manage the lands entrusted to it so as to maintain viable populations of native vertebrate species, regardless of whether they are listed by another agency. *See* Order on Motions for Summary Judgment and for Dismissal at 15-20 (Mar. 7, 1991) (Dkt. # 824). An FWS designation of "critical habitat" does not imply that logging will be excluded; the designation "does not prescribe any particular management regime in the areas so designated," and permitted activities may "include timber harvests." *See* 56 Fed. Reg. 20816, 20817-18, 20820 (1991). FWS still has no spotted owl recovery plan. Its recommendation of "prudent measures" to the Forest Service may simplify the work, but does not relieve the latter agency of its stewardship of the national forests.

35. The logging of 66,000 acres of owl habitat, in the absence of a conservation plan, would itself constitute a form of irreparable harm. Old growth forests are lost for generations. No amount of money can replace the environmental loss.

36. While the agency's proposal would involve logging an estimated one percent of the remaining habitat, the experts agree that cumulative loss of habitat is what has put the owl in danger of extinction. There is a substantial risk that logging another 66,000 acres, before a

plan is adopted, would push the species past a population threshold from which it could not recover. Dr. Gordon Orians, an expert in avian populations and ecology, has testified:

> Q. Can you summarize why you recommend that there be no further logging while the agency determines its new management plan?
>
> A. I recommend a cessation of logging of owl habitat in the short run because I think the risk that the population crosses a very significant viability threshold is increased significantly by continued loss of its habitat. This will reduce the options to maintain viability in the future.
>
> * * *
>
> Q. What does "significant probability" mean here?
>
> A. "Significant probability" means, in this context, that given the threats that exist on the owl now, by implementing the plan in a manner that continues to lose significant amounts of habitat during a transition period poses very significant risks to the spotted owl population; that is, a reasonably high probability that it would cross such a threshold line.

Tr. at 85, 141.

The Forest Service may decide that Dr. Orians is mistaken, but it has not done so yet.

E. Economic and Social Consequences

37. The testimony on economic impact assumed a sixteen-month injunction. The Forest Service would sell between 1.734 and 1.423 billion board feet of timber in fiscal year 1991 (which ends September 30, 1991) from the

seventeen "spotted owl" national forests, if permitted to sell timber consistent with the ISC Report. On the same basis it would sell in fiscal year 1992 between 1.9 and 1.453 billion board feet. The sale levels if owl habitat were protected in the interim would be about .394 billion board feet in 1991 and .415 billion in 1992. The difference between protecting and not protecting habitat until the Forest Service develops its plan would thus be between 1.03 and 1.34 billion board feet during fiscal year 1991 and between 1.04 and 1.59 billion board feet during fiscal year 1992.

38. The injunction would not prohibit the logging of existing sales, but rather the sale of additional logging rights in owl habitat areas while the Forest Service was in the process of adopting a plan. Thus, timber sale reductions do not translate directly into harvest reductions.

39. The estimate used by all parties is that as of February 28, 1991, there were 4.778 billion board feet of uncut timber under contract in the "spotted owl" forests. That figure includes four 1990 sales, aggregating 14.1 million board feet, which are subject to a revived legal challenge as the result of a recent court of appeals decision holding that section 318's fifteen-day statute of limitations was equitably tolled. *Seattle Audubon Soc'y v. Robertson*, No. 90-35774 (9th Cir. 1991). SAS and the other environmental organizations represented by its counsel have waived in open court any challenge to the remaining 1990 sales (except for two which are not yet awarded). Tr. at 24. Subtracting the 14.1 million leaves about 4.764 billion board feet under contract and free of legal challenge. When added to the amount of timber the Forest Service would sell while protecting owl habitat,

that supply of timber would last about nineteen months if logging proceeded at the rate experienced during fiscal year 1990. The most credible current forecasts suggest that demand for wood products during 1991 and 1992 will be at or below that of 1990.

40. Any after-effects of an injunction would be reduced by the fact that its period would be six months shorter than that requested by the agency and assumed by the economists who testified.

41. Additional timber supplies from private lands can reasonably be expected to enter the market if the price of timber stumpage increases, as it probably will do if Forest Service sales decline. In addition, some timber now exported will probably be diverted to the domestic market.

42. To the extent that Pacific Northwest mills have had supply shortages, the problem has been exacerbated by the export of raw logs. About thirty percent of the timber harvested in Washington and eleven percent of that harvested in Oregon is exported. Exports from private lands in Washington, Oregon, and Northern California during 1989 totalled 3.637 billion board feet. The exported logs produce no mill jobs or added value in the United States. A ban on exports would not automatically shift every raw log to domestic buyers, but would provide a major source of additional supply. It is true, as the Forest Service and WCLA point out, that transportation costs from Western Washington to Southern Oregon exceed those for logs produced in the immediate vicinity.

They are nevertheless lower than the costs of transportation to Japan, China, or Korea. An export ban would also have the effect of moderating log prices generally.

43. While some mills may experience log shortages during the period of an injunction, that would occur to some degree regardless of whether owl habitat is protected, and there is no way of assuring that the mills most in need of logs would get them if the Forest Service proposal were adopted. National forest timber sales must be awarded on competitive bids. 36 C.F.R. 223.100.

44. Over the past decade many timber jobs have been lost and mills closed in the Pacific Northwest. The main reasons have been modernization of physical plants, changes in product demand, and competition from elsewhere. Supply shortages have also played a part. Those least able to adapt and modernize, and those who have not gained alternative supplies, have been hardest hit by the changes. By and large, the companies with major capital resources and private timber supplies have done well; many of the smaller firms have had trouble.

45. Job losses in the wood products industry will continue regardless of whether the northern spotted owl is protected. A credible estimate is that over the next twenty years more than 30,000 jobs will be lost to worker-productivity increases alone.

46. A social cost is paid whenever an economic transformation of this nature takes place, all the more so when a largely rural industry loses sizeable numbers of jobs. Today, however, in contrast to earlier recession periods, states offer programs for dislocated workers that ease and facilitate the necessary adjustments.

47. Counties in timber-dependent communities derive revenues from the harvest of national forest timber. Federal law presently guarantees counties at least 90% of the average of receipts obtained between 1988 and 1990, unless timber harvests during fiscal 1991 fall by 78%, which no evidence suggests would occur. Revenues from this source will decline later if harvests decline. These public entities, however, do not expect to obtain revenues from sales made in violation of law.

48. The timber industry no longer drives the Pacific Northwest's economy. In Oregon, for example, the level of employment in lumber and wood products declined by seventeen percent between 1979 and 1989. In the same period, Oregon's total employment increased by twenty-three percent.

49. The wood products industry now employees about four percent of all workers in Western Oregon, two percent in Western Washington, and six percent in Northern California. Even if some jobs in wood products were affected by protecting owl habitat in the short term, any effect on the regional economy probably would be small.

50. The remaining wilderness contributes to the desirability of this region as a site for new industries and their employees. The resulting economic gains, while hard to measure, are genuine and substantial. The FWS has recently noted that preservation of old growth brings economic benefits and amenities "of extremely high value." 56 Fed. Reg. 20816, 20822 (May 6, 1991). Exh. A-63.

VI.

THE PUBLIC INTEREST AND THE BALANCE OF EQUITIES

The court must weigh and consider the public interest in deciding whether to issue an injunction in an environmental case. *See, e.g., Sierra Club v. Penfold,* 857 F.2d 1307, 1318 (9th Cir. 1988); *Northern Alaska Environmental Center v. Hodel,* 803 F.2d 466, 471 (9th Cir. 1986). It must also consider the balance of equities among the parties. *Village of Gambell,* 480 U.S. at 545.

The problem here has not been any shortcoming in the laws, but simply a refusal of administrative agencies to comply with them. See Findings 12 through 15, above. This invokes a public interest of the highest order: the interest in having government officials act in accordance with law. *See Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

The public also "has a manifest interest in the preservation of old growth trees." *Pilchuck Audubon Soc'y v. MacWilliams,* 19 ELR 20526, 20529 (W.D. Wash. 1988).

This is not the usual situation in which the court reviews an administrative decision and, in doing so, gives deference to agency expertise. *See Northwest Coalition for Alternatives to Pesticides v. Lyng,* 844 F.2d 588, 590-91 (9th Cir. 1988). The Forest Service here has not taken the necessary steps to make a decision in the first place – yet it seeks to take action with major environmental impact.

The loss of an additional 66,000 acres of spotted owl habitat, without a conservation plan being in place, and

with no agency having committed itself to the ISC strategy, would constitute irreparable harm, and would risk pushing the species beyond a threshold from which it could not recover.

Any reduction in federal timber sales will have adverse effects on some timber industry firms and their employees, and a suspension of owl habitat sales in the national forests is no exception. But while the loss of old growth is permanent, the economic effects of an injunction are temporary and can be minimized in many ways. *See* Findings 37 through 50, above.

To bypass the environmental laws, either briefly or permanently, would not fend off the changes transforming the timber industry. The argument that the mightiest economy on earth cannot afford to preserve old growth forests for a short time, while it reaches an overdue decision on how to manage them, is not convincing today. It would be even less so a year or a century from now.

For the reasons stated, the public interest and the balance of equities require the issuance of an injunction directing the Forest Service to comply with the requirements of NFMA by March 5, 1992, and preventing it from selling additional logging rights in spotted owl habitat until it complies with the law.

VII.

INJUNCTION

On the basis of the foregoing findings and conclusions, it is ordered and adjudged that:

A. The Forest Service is enjoined to proceed diligently in compliance with NFMA, as required by the order entered on April 1, 1991 (Dkt. # 867), and to submit to the court and have in effect by March 5, 1992, revised standards and guidelines to ensure the northern spotted owl's viability, together with an environmental impact statement, as required by NFMA and its implementing regulations. The agency is directed to submit to the court by June 15, 1991, a timetable for completion of the steps to meet this schedule.

B. The Forest Service is further enjoined from auctioning or awarding any additional timber sales from Forest Service Regions Five and Six that would log suitable habitat for the northern spotted owl, as defined above, until the said standards and guidelines are adopted and in effect.

The clerk is directed to send copies of this order to all counsel of record.

Dated: May 23, 1991.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. F. DALE ROBERTSON, et al., Defendants.	NO. C89-160WD CONSOLIDATED WITH NO. C89-99(T)WD
WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Plaintiffs, v. F. DALE ROBERTSON, et al., Defendants.	ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND FOR DISMISSAL FILED MAR 7 1991

I.

INTRODUCTION

The history of these cases, and of the earlier rulings made by this court and the court of appeals, is summarized in the Order on Motions Heard December 5, 1990 (Dkt. # 757). Sections I and II of that order, at pages 1-9, are incorporated by reference in this introduction.

The December 18 order ruled that twelve fiscal year 1990 timber sales advertised by the Forest Service could not be awarded because the agency had failed to comply

with applicable laws. In particular, the agency had failed to have in place "plans for units of the national forest system" that "incorporate the standards and guidelines" required by 16 U.S.C. § 1604(c), one of which requires the agency to assure the viability of all native vertebrate species, including the northern spotted owl. 16 U.S.C. § 1604(g) and 36 C.F.C. § 219.19. The order enjoined the Forest Service from awarding the sales "until such time as it shows compliance with the environmental statutes." *Id.* at 17. The agency was given leave to argue a newly-raised contention that its alleged compliance with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, would eliminate any duties in regard to the owl under the NFMA. That argument has been made and is rejected in today's order. On February 15, 1991, the Forest Service appealed to the court of appeals from the December 18 order. To expedite matters, this court recommends that any appeal from today's order be consolidated with the appeal taken on February 15.

The following motions are now ready for decision:

1. The motion of plaintiffs Seattle Audubon Society, et al. ("SAS"), for summary judgment declaring that the proposal of defendants F. Dale Robertson, et al. ("Forest Service"), to log northern spotted owl habitat without complying with certain statutes is contrary to law. The statutes claimed to be applicable are the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C § 4321 *et seq.*; and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703 *et seq.* SAS seeks an injunction requiring the Forest Service to adopt standards and guidelines to insure the spotted owl's viability pursuant

to NFMA; to prepare environmental impact statements pursuant to NEPA; and to obtain permits required by MBTA.

2. The Forest Service's cross-motion for summary judgment on essentially the same issues. This motion seeks a ruling that the notice published in the *Federal Register* on October 3, 1990, advising that the agency was vacating the December 1988 Record of Decision ("ROD") initially challenged herein, and stating that it would "conduct timber management activities in a manner not inconsistent with the Interagency Scientific Committee recommendations," constituted lawful agency action. The Forest Service contends that action taken under the notice will not violate NFMA, NEPA, or MBTA, and seeks dismissal of SAS's claims to the contrary. The agency seeks to vacate the order of December 18, 1990, *supra*, enjoining it from awarding twelve specified sales until it complied with the applicable environmental statutes.

3. SAS's motion for summary judgment determining that the December 1988 ROD violates the environmental statutes, and the Forest Service's cross-motions asserting that no case or controversy on that subject exists because the ROD has been withdrawn, and seeking dismissal of SAS's claims involving the ROD on that basis.

4. The Forest Service's motion to dismiss the complaint of plaintiffs Washington Contract Loggers Association, et al. ("WCLA"), because that complaint challenged only the now-withdrawn ROD and no case or controversy now exists.

5. SAS's motion for summary judgment under NFMA, NEPA, and MBTA as to five sales that were

enjoined earlier under the temporary standards set by Congress for fiscal year 1990, or were withdrawn by the Forest Service after a challenge was filed, and are not currently proposed. The temporary standards are found in section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"). The Forest Service seeks a ruling that the question as to the five sales is moot.

Following oral argument on these motions on January 17, 1991, the parties were granted leave to file additional materials, and the record was completed with supplemental filings on February 11, 1991.

On February 26, 1991, the Honorable Thomas S. Zilly of this court ruled, in a separate case, that the United States Fish and Wildlife Service ("FWS") has acted contrary to law in failing to designate critical habitat for the northern spotted owl as a threatened species under the ESA. Order Granting Plaintiffs' Motion for Summary Judgment and Motion to Compel Designation of Critical Habitat, *Northern Spotted Owl (Strix Occidentalis Caurina), et al., v. Lujan, et al.* (No. C88-573Z W.D. Wash.) (Feb. 26, 1991) (Dkt. # 126). The court in that case ordered the FWS to file by March 15, 1991, a written plan for completing its critical habitat review, and to publish its proposed plan within forty-five days thereafter. *Id.* at 20.

II.

STANDARD OF REVIEW

There are no genuine issues of material fact for trial as to the motions listed above, and they may be decided on summary judgment. Fed. R. Civ. P. 56.

The court in reviewing a challenged administrative action determines whether the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or was taken without observance of procedures required by law. *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 980-81 (9th Cir. 1985); 5 U.S.C. § 706. The standard is narrow and presumes the agency action is valid, *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), but does not shield agency action from a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

The focal point for judicial review is the administrative record in existence, not a new record made initially in the reviewing court. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980). The court may, however, consider evidence outside the administrative record for certain limited purposes, e.g., to explain the agency's action or to determine whether its course of inquiry was insufficient or inadequate. *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *Animal Defense Counsel v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).

III.

THE FOREST SERVICE'S DUTIES UNDER NFMA ARE NOT CANCELLED AS TO SPECIES LISTED UNDER ESA

A. Statement of the Issue

The amended court of appeals decision of October 30, 1990, made clear that the general environmental statutes continue to apply to the Forest Service in its planning and awarding of timber sales in the national forests. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). Congress may amend those statutes, but it failed to do so when it adopted section 318 as a temporary measure. The requirements of section 318 are in addition to those already in existence. *Id.* at 1316. In the present motions the Forest Service argues that its duties under NFMA and NEPA, insofar as they involve the spotted owl, are cancelled by another statute. In this instance the agency relies on EPA. The notice published by the Forest Service in the *Federal Register* on October 3, 1990, stated in part:

> On April 2, 1990, the Interagency Scientific Committee released its findings and recommendations in a report entitled "A Conservation Strategy for the Northern Spotted Owl." On June 22, 1990, the Fish and Wildlife Service listed the northern spotted owl under the Endangered Species Act as threatened throughout its range, 55 FR 26114.
>
> * * *
>
> Listing of a species under the Endangered Species Act constitutes a determination by the Fish and Wildlife Service that the species is in danger of extinction and therefore does not have a viable population, as defined at 36 CFR 219.19,

> in the area in which it is listed. As a consequence of the listing of the northern spotted owl, the Forest Service's regulatory authority for planning and management of the habitat of the northern spotted owl is superseded by the requirements of the Endangered Species Act. . . .
>
> Taking consideration of the statutory requirements and scientific analysis referenced above, the 1988 Record of Decision, and all direction therein, is vacated. The SOHAs established in compliance with the Record of Decision direction are, therefore, also vacated, as well as any previous decisions concerning management of spotted owl habitat. As a result, all final Forest Plans are therefore amended to incorporate this vacation and return the SOHAs established in compliance with the 1988 Record of Decision to the land classifications of the adjacent lands as established in the respective final Forest Plans. Pending enactment of new legislation, any applicable action by the Endangered Species committee, adoption of a recovery plan by the Fish and Wildlife Service, or the results of further biological consultation between the Forest Service and the Fish and Wildlife Service, the Forest Service will conduct timber management activities in a manner not inconsistent with the Interagency Scientific committee recommendations, which are more than sufficient to assure compliance with the Endangered Species Act during this interim period.

55 Fed. Reg. 40412, 40413.

The Forest Service argues that this notice commits it to comply with EPA, and that EPA, once a species is listed, relieves it of its duties under NFMA and other statutes. SAS argues that the Forest Service's duties under the statutes are concurrent, and that the agency has failed

to meet its obligations under NFMA and NEPA as to timber sales proposed in accordance with the notice. These claims are raised in SAS's second amended complaint. *See* Second Amended Complaint for Declaratory and Injunctive Relief, First and Fourth Claims (Nov. 29, 1990) (Dkt. # 731).

B. Reviewable Administrative Action

SAS seeks review of the Forest Service's action in publishing the notice withdrawing the ROD and committing itself to "conduct timber management activities in a manner not inconsistent with the Interagency Scientific Committee recommendations."

The Administrative Procedure Act ("APA") provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. This provision contains two requirements. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185 (1990). The person seeking review must show, first, an agency action; second, that he or she has suffered legal wrong because of the challenged action, or is adversely affected or aggrieved by it within the meaning of a relevant statute. *Id.* at 3186. That SAS is "adversely affected or aggrieved" by a proposal to log spotted owl habitat without compliance with NFMA standards and procedures, *see* Declaration of Bonnie Phillips-Howard (Jan. 14, 1991) (Dkt. # 783), is not contested. The Forest Service

argues, however, that "agency action" is lacking, and that accordingly there is nothing to review.

Agency action is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). When review is sought under the general review provisions of the APA, the action in question must be "final agency action." *Lujan*, 110 S. Ct. at 3185.

The Forest Service's action here was final in that it proposed to award timber sales – "conduct timber management activities" – pursuant to the *Federal Register* notice and without adopting a spotted owl management plan. Nothing further was to be done except the making of individual sales. It would make little sense, and would waste the resources of all parties, to require a separate challenge to each sale if the agency had omitted a step required by law to make any sales in spotted owl habitat areas. The action was thus "final" for purposes of judicial review. *Lujan*, relied upon by the Forest Service, is not to the contrary. The Court there said:

> If there is in fact some specific order or regulation, applying some particular measure across-the-board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review . . . it can of course be challenged under the APA by a person adversely affected . . . .

Lujan, 110 S. Ct. at 3189 n.2. The agency action here corresponds to the description in *Lujan*. *See also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1169-70

(6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *National Helium Corp. v. Morton*, 455 F.2d 650, 654 (10th Cir. 1971).

C. Discussion

The Forest Service's argument that its duties under EPA displace those imposed upon it by NFMA and NEPA is refuted by the statutes themselves and the agency's own established practices in applying them.

ESA provides "a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). The program is activated when FWS lists a species of wildlife as endangered or threatened. An endangered species is one "which is in danger of extinction throughout all or a significant portion of its range . . . . " 16 U.S.C. § 1532(6). A threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

ESA requires each federal agency to

> insure that any action authorized, funded, or carried out [by it] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species . . . .

Id. § 1536(a)(2). If an agency proposes an action that may affect an endangered or threatened species it must, before proceeding further, consult with FWS. *Id.* § 1536(a), (b). Once the agency has initiated consultation, it may not make "any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the

formulation or implementation of any reasonable and prudent alternative measures . . . . " *Id.* § 1536(d).

The result of the consultation is a "biological opinion" from FWS – a document which advises whether the proposal complies with ESA. *Id.* § 1536(b)(3), (4). In the biological opinion, FWS must decide if the proposed action jeopardizes the species' continued existence or adversely modifies or destroys critical habitat. *Id.* § 1536(b)(3)(A). If it does, the opinion must recommend prudent and reasonable alternatives to avoid those consequences. *Id.*

The Forest Service argues that it is complying with the ESA as to the spotted owl. The argument was advanced before the February 26, 1991, ruling in No. C88-573Z, where the court held:

> Upon the record presented, this Court finds the [Fish and Wildlife] Service has failed to discharge its obligations under the Endangered Species Act and its own administrative regulations. Specifically, the Service acting on behalf of the Secretary of the Interior, abused its discretion when it determined not to designate critical habitat concurrently with the listing of the northern spotted owl, or to explain any basis for concluding that the critical habitat was not determinable. These actions were arbitrary and capricious, and contrary to law. 5 U.S.C. § 706.

Order Granting Plaintiffs' Motion for Summary Judgment at 19, *Northern Spotted Owl (Strix Occidentalis Caurina), et al., v. Lujan, et al.* (No. C88-573Z W.D. Wash.) (Feb. 26, 1991) (Dkt. # 126).

In view of that ruling, the Forest Service is arguing, in effect, that its duties are discharged by complying with

the directives of another agency which itself is failing to meet its statutory duty. But the argument that NFMA and NEPA cease to apply once a species has been listed cannot be sustained in any event.

NFMA, passed three years after ESA, directs the Secretary of Agriculture to promulgate regulations to provide for diversity of plant and animal communities in order to meet overall multiple-use objectives. 16 U.S.C. § 1604(g)(3)(B). To that end, a regional guide is required for each administratively designated Forest Service region to provide standards and guidelines for forest planning. 36 C.F.R. 219.8(a). Regional foresters establish policy and approve all forest plans in their regions. *Id.* § 219.10(a). Forest supervisors prepare and implement forest plans. *Id.* § 219.10(a)(2). A minimum requirement is that

> [f]ish and wildlife shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

§§ 219.13, 219.19. A viable population is "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." *Id.* § 219.19. To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals. *Id.*

The duty to maintain viable populations of existing vertebrate species requires planning for the entire biological community – not for one species alone. It is distinct from the duty, under the ESA, to save a listed species from extinction.

Under NFMA, species whose population changes are believed to reflect the impact of logging and other activities, and to measure wildlife viability, are selected as "indicator species." *Id.* § 219.19(a)(1). The northern spotted owl is an indicator species.

The Forest Service argues that while NFMA requires it to "maintain viable populations," ESA's purpose is to return threatened or endangered species to the point where their populations *are* viable. The agency thus contends that NFMA applies only to non-viable species, and that once a species becomes threatened or endangered ESA alone defines the Forest Service's duties.

However, NFMA was enacted three years later than ESA, and nothing in its language or legislative history suggests that Congress intended to exclude endangered or threatened species from NFMA's procedural and substantive requirements. The regulations under NFMA explicitly address endangered and threatened species. They do not suggest that ESA alone governs, or imply any conflict between the two statutes.

The record shows that the Forest Service has understood at all times that NFMA continues to apply after a species is listed under ESA. The regulations under NFMA impose the following requirement, among others, on management planners:

> Habitat determined to be *critical for threatened and endangered species* shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat. Objectives shall be determined *for threatened and endangered species* that shall provide for, where possible, their removal from listing as

> threatened and endangered species through appropriate conservation measures, including the designation of special areas to meet the protection and management needs of such species.

Id. § 219.19(a)(7) (emphasis added).

An illustration of the agency's recognition that NFMA and ESA apply concurrently is provided by its recent decision to proceed with the Erika timber sale in the Gifford Pinchot National Forest. The relevant documents were signed in December 1990 and January 1991. The decision notice states that the Erika sale is "not inconsistent with the Interagency Scientific Committee's recommendations" although "suitable spotted owl habitat will be harvested in this project." The finding of no significant impact states that the spotted owl "will be protected according to current guidelines," although none are identified beyond the *Federal Register* notice. The environmental assessment analyzes the spotted owl both as a threatened species and a management indicator species, and notes that "one forest objective is to maintain viable populations of these [indicator] species." *See* Declaration of Todd D. True in Support of SAS' Motion for Leave to File Supplemental Exhibit, Exh. A (Feb. 4, 1991) (Dkt. # 811). These documents plainly recognize both that ESA and NFMA apply to the Forest Service's management of the spotted owl.

Similarly, in the Land and Resource Management Plan for the National Forests of Mississippi the agency designates the redcockaded woodpecker, a federally listed endangered species under ESA, *see* 50 C.F.R. § 1711(h), as a management indicator species under

NFMA pursuant to section 219.19. *See* Declaration of Richard A. Stahl, Ex. D (Nov. 29, 1990) (Dkt. # 734).

The Forest Service Manual provides, in the section on "Wildlife, Fish, and Sensitive Plant Habitat Management":

> Incorporate consideration of wildlife, fish, and sensitive plant resources in forest plans as required by the National Forest Management Act, implementing regulations at 36 CFR 219, and direction at FSM 1920. Specifically:
>
> * * *
>
> 4. Determine habitat and management requirements *for the recovery of threatened, endangered, and sensitive species.*
>
> 5. Develop minimum management requirements for the maintenance of viable populations.

Forest Service Manual 2600, § 2621.1(4)(5) (U.S.C.A. Forest Service June 1, 1990) (emphasis added) (Dkt. # 812, Exh. B).

The Forest Services argues that its own interpretation of the statute should govern. *See Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). However, an agency cannot exempt itself from duties plainly imposed by law; it cannot decide that only one of two statutes governs its activities when the laws themselves, and the implementing regulations, clearly show that both apply. *See Quinault v. Sullivan*, 916 F.2d 524, 526-27 (9th Cir. 1990). Moreover, if agency interpretation is determined by agency practice rather than by an argument raised in court, it is clear that the Forest Service

has understood at all times that its duties under NFMA and EPA are concurrent.

The listing of the northern spotted owl as a threatened species did not relieve the Forest Service of its obligations under NFMA or NEPA.

IV.

THE FOREST SERVICE'S NOTICE WITHDRAWING THE 1988 RECORD OF DECISION DOES NOT CONSTITUTE COMPLIANCE WITH THE NFMA'S PROCEDURAL REQUIREMENTS

The Forest Service contends that the *Federal Register* notice vacating the ROD, stating that the agency would act in a manner not inconsistent with the ISC recommendations, and announcing that the agency's regulatory authority for the planning and management of spotted owl habitat is superseded by the ESA, is lawful agency action. This argument depends, first, on the proposition that the Forest Service is bound by the notice to conform to the ISC report. The Forest Service has argued to this court:

> Significantly, the Federal Register notice has the same legal consequence as a regional guide. The requirement to comply with the ISC's strategy is mandatory . . . .
>
> The upshot is that while the notice adopted the ISC's strategy in a different way than contemplated by the regulations under NFMA, the notice still binds the agency in the same manner as a regional guide. . . .

Reply Memorandum in Support of Defendants' Motion for Summary Judgment at 5 (Jan. 15, 1991) (Dkt. # 786).

However, the Forest Service has argued the opposite in the Eastern District of California. In opposing a motion for a preliminary injunction in *Northcoast Environmental Center, et al., v. Paul Barker, et al.*, No. S-90-1250-EJG, it told the court:

> Plaintiffs allege that the Forest Service is now bound by the ISC conservation strategy. In making this argument, plaintiffs take the language out of context and completely ignore the major thrust of the announcement . . . .
>
> * * *
>
> Plaintiffs' sole theory for relief, that the ISC conservation strategy has now become a part of the Forest Service regional guide pursuant to 36 C.F.R. 219.4(b)(2), is expressly repudiated by the very language of the notice of decision itself.

Northcoast Environmental Center, et al., v. Paul Barker, et al. (S-90-1250-EJG E.D. Ca. 1990) (Dkt. # 822).

Counsel for the Forest Service in the present case did not represent the agency in the *Northcoast* case.

The agency has tried to mitigate this conflict by submitting a memorandum from its deputy chief to a regional forester expressing "concerns about the manner in which you are proceeding" in *Northcoast*, and stating:

> [O]ur position as reflected in all legal filings should be that the Forest Service is bound by the direction in the October 3, 1990, *Federal Register* notice, and that all timber management activities must comply with the ISC recommendations.

SAS's Supplemental Memorandum Re Forest Service Documents Submitted at Oral Argument on January 17, 1991, Exh. B (Jan. 25, 1991) (Dkt. # 800).

However, a statement by one agency executive to another as to what should be expressed in legal filings does not amount to a legal commitment that binds the agency. At best, the Forest Service's expressed views reflect a split of opinion in its ranks over whether it has bound itself to follow the ISC recommendations.

The basic question, however, is whether the Forest Service's expressed commitment to award further sales in a manner "not inconsistent with" those recommendations could in any event be held a lawful substitute for the procedural steps required by NFMA.

NFMA requires the Forest Service to develop regulations specifying guidelines for land management plans in order to provide for diversity of plant and animal communities. 16 U.S.C. § 1604(g)(1), (3)(B). The regulations require each region to develop a regional guide. 36 C.F.R. 219.8(a). The regional guides must contain standards and guidelines for forest planning. *Id.*

The process for adopting the regional guides is spelled out in detail in the regulations. Draft and final environmental impact statements must be prepared for the proposed standards and guideline. *Id.* § 219.08(c). Public participation in the process is mandated. *Id.*; see also 16 U.S.C. § 1604(d) ("The Secretary shall provide for public participation in the development, review, and revision of land management plans. . . . "). The Forest Service Chief's approval or disapproval of the proposed guide must be publicly documented. 36 C.F.R. § 219.08(d).

Once adopted, the regional guide may be amended. If the proposed amendment would result in a significant

change in the guide, the procedures required for developing the guide must again be followed to amend it. *Id.* § 219.08(f). Similar procedures are mandated at the forest planning level. *See id.* § 219.10.

The Forest Service argues that the notice adopting the ISC recommendations is "a set of guidelines and standards" with the "same legal consequences as a regional guide."

The difficulty with this argument – aside from the agency's ambivalence over whether it has bound itself – is that it assumes an administrative agency has the power to omit procedures required by law when it believes they would be unnecessary or inconvenient.

NFMA mandates a thorough process with participation by the public, the government, and the scientific community. The aim is to ensure both an informed public and an informed agency. *See* 36 C.F.R. § 210.6(a)(1), (2). The Forest Service here did not follow any of the procedures required before publishing the notice and announcing that it would act "not inconsistently" with the ISC report.

The ISC report is widely regarded as thorough, careful, and scientifically credible. But an agency cannot substitute its announced intention to follow a report – even a prestigious one – for the procedures required by law.

Nor can the statutory requirements be ignored because some conservation organizations urged the Forest Service last year to adopt the ISC recommendations. It does not appear that they urged adoption without public hearing or comment. Their statements tend to show they

believed still more should be done. For example, in a letter to the Secretaries of Agriculture and Interior, nine environmental groups wrote that the "ISC strategy cannot withstand any further balancing or compromise. It should, in fact, be strengthened, not weakened. . . . " Declaration of Allan Brock in Support of Defendants' Motion for Summary Judgment, Exh. M. (Dec. 5, 1990) (Dkt. # 740). In a separate letter to the Secretary of Agriculture, the National Audubon Society stated:

> [T]he ISC recommendations represent far less than the optimal approach to protecting the species, as these recommendations were skewed by economic and political considerations. The ISC plan, therefore, involves sizable risk that a viable population of owls will not be maintained.

Id., Exh. I.

But in any event neither the authors of such letters nor the Forest Service had the power to waive, in behalf of other organizations or the public, the procedures mandated by law.

The impetus to amend the 1988 ROD came from section 318. That statute directed the agency to review and revise the ROD, and in doing so to consider any new information, including the ISC report. The review, and any changes to the ROD, were to be completed and in effect by September 30, 1990. Section 318 did not change the hearing and impact statement procedures required by NFMA to make such an amendment. The Forest Service argues that where a statute imposes a deadline an impact statement is not required if the agency cannot prepare it within the time set for the decision. *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Ok.*, 426 U.S. 776, 788

(1976). The law, however, is that the agency must comply to the fullest extent possible; the provisions may not be used as a means of avoiding compliance with the directives of NEPA. *Id*. Here, the Forest Service has not shown that it could not have completed the EIS by, or at least close to, the appointed time. Most importantly, it has offered no reason why the process was never even begun. At a minimum the process could have been well along by the date set by Congress for completion. The agency had no basis for failing even to attempt compliance with the statutes.

V.

THE NEPA REQUIREMENTS ARE ADOPTED BY NFMA

In amending a regional guide in any significant way, the Forest Service is required by NFMA to follow NEPA procedures:

> If the change resulting from the proposed amendment is determined to be significant, the Regional Forester shall follow the same procedure for amendment as that required for development and approval of a regional guide.
>
> * * *
>
> A regional guide shall be developed for each administratively designated Forest Service region. . . . Regional guides shall provide standards and guidelines for addressing major issues and management concerns which need to be considered at the regional level to facilitate forest planning.

* * *

A draft and final environmental impact statement shall be prepared for the proposed standards and guidelines in the regional guide according to NEPA procedures.

36 C.F.R. § 219.8(f), (a), (c) (emphasis added).

The published notice withdrawing the 1988 ROD, stating that the Forest Service would proceed not inconsistently with the ISC report, and amending the forest plans accordingly, plainly amounted to a "significant" proposed amendment. Therefore, draft and final environmental impact statements were required. Since this requirement is contained in NFMA itself, it is not necessary to decide whether NEPA would be applicable but for the NFMA adoption of the same procedures. *See* 16 U.S.C. § 1604(g)(1).

VI.

MBTA DOES NOT APPLY

MBTA makes it illegal to "pursue, hunt, take capture, kill, attempt to take, capture, or kill . . . " any migratory bird or "any part, nest, or egg of any such bird" by any means or in any manner, 16 U.S.C. § 703, except as may be permitted by a valid permit issued pursuant to regulations, 50 C.F.R. 21.11. The northern spotted owl is a migratory bird as defined by the regulations. 50 C.F.R. 10.13.

Whether the Forest Service's timber management plan, or timber sales fashioned pursuant to it, violate MBTA depends on the interpretation of "taking." Under the regulations promulgated pursuant to MBTA, to "take"

is to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12. Under ESA, to "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" under ESA means

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

SAS asks the court to engraft ESA's broader definition of a "taking" onto MBTA. It relies upon a Supreme Court case declaring protection of migratory birds to be a "national interest of very nearly the first magnitude," *State of Missouri v. Holland*, 252 U.S. 416 (1920), and another stating that ESA sheds light upon similar terms in MBTA, *Andrus v. Allard*, 444 U.S. 51, 62 (1979).

But the differences between a "taking" under ESA and MBTA are distinct and purposeful. ESA, enacted in 1973, included "harass" and "harm" in the definition. Pub. L. 93-205, § 3, 87 Stat. 885. Congress amended MBTA the following year, and did not modify its prohibitions to include "harm." Pub. L. 93-300, § 1, 88 Stat. 190. It is the "harm" part of the definition that makes "significant habitat modification or degradation" illegal. The Court cannot do what Congress, and the Department of Interior, did not do. The statute and regulations intended to preserve an endangered or threatened species differ from those adopted pursuant to international treaties. This is

illustrated by the exception, from the prohibition on taking migratory birds, for the regulated hunting of migratory game birds. *See* 50 C.F.R., Part 20.

SAS points out that the taking of migratory birds is prohibited "at any time, by any means or in any manner," 16 U.S.C. § 703. But the cases regarding MBTA violations do not support the kind of application urged here. *See, e.g., United states v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (killing of migratory birds by dumping wastewater); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Ca.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (deaths of birds resulting from misapplication of pesticides).

The parties disagree as to whether a private party may obtain judicial review of agency action challenged as violative of MBTA in the first place. While the answer is not entirely clear, the court concludes that, in a proper case, jurisdiction would exist under MBTA, APA (5 U.S.C. § 702), and 28 U.S.C. § 1331. *See Merrell v. Thomas*, 807 F.2d 776, 782 n.3 (9th Cir.), *cert. denied*, 484 U.S. 848 (1987). But the challenge brought here cannot succeed because the Forest Service's action in awarding timber sales would not involve a "taking" of migratory birds within the meaning of MBTA.

VII.

THE QUESTION WHETHER THE 1988 ROD VIOLATED NFMA AND NEPA IS MOOT IN VIEW OF THE AGENCY'S WITHDRAWAL OF IT

The Forest Service's notice published at 55 Fed. Reg. 40412 withdrew the December 1988 ROD in its entirety.

Nothing has been substituted in its place. The agency has not adopted a new or amended ROD.

SAS has moved nevertheless for summary judgment that the discarded ROD is in violation of the environmental statutes. It must be kept clearly in mind that the motion is addressed to the ROD as an administrative measure. The same standards, modified to increase the size of protected areas, were adopted by Congress as to fiscal year 1990 sales in section 318: "All other standards and guidelines contained in the Chief's Record of Decision are adopted." Section 318(b)(3). That enactment of ROD standards as temporary statutory law is not challenged by SAS's motion. SAS argues, however, that with the expiration of section 318 the ROD must now be tested for legality under the general environmental statutes.

The Forest Service has agreed that, if the question were reached on the merits, the answer would have to be that the ROD fails to comply with applicable law. There is now no dispute that the ROD would fail to maintain a viable population of northern spotted owls. The agency argues, however, that the question should not be reached because no case or controversy exists, the ROD having been withdrawn.

On this point the Forest Service is correct. Under Article III of the constitution the courts are "to decide actual controversies . . . and not to give opinions upon . . . abstract propositions." *Mills v. Green*, 159 U.S. 651, 653 (1895). If the question to be adjudicated is mooted by later developments, no justiciable controversy is presented. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Here the ROD has been withdrawn in its entirety by the Forest

Service, and as matters now stand it cannot and will not be a basis for agency action. Accordingly, the question whether the discarded ROD would violate environmental statutes is academic; it need not and should not be decided. *See Racine v. United States*, 858 F.2d 506 (9th Cir. 1988).

VIII.

DISMISSAL OF WCLA's COMPLAINT

WCLA in its complaint has challenged the 1988 ROD as unlawful, but has not sought relief based on other Forest Service action. The Forest Service now moves for dismissal on the ground that no case or controversy exists in view of the withdrawal of the ROD. WCLA has not opposed the motion. The motion is granted and WCLA's complaint is dismissed without prejudice. The briefs and arguments of WCLA's counsel have been valuable throughout this litigation. As to any future issues in the case, *amicus curiae* briefs from counsel may be filed.

IX.

SAS'S MOTION RE FIVE SALES EARLIER ENJOINED OR WITHDRAWN

SAS has moved for summary judgment under NFMA, NEPA, and MBTA as to five timber sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed. The Forest Service has responded that the question is moot. The sales involved are the Garden, Nita, and South Nita sales (enjoined), and the First and Last sales (withdrawn after a challenge was filed). Nothing in

the record suggests that the Forest Service plans to go forward with these sales. There is accordingly no case or controversy as to them. SAS's motion is denied without prejudice to its renewal should the Forest Service advertise or otherwise proceed with any of these five sales.

X.

SUMMARY OF RULINGS

The rulings now made may be summarized as follows:

1. The motion of SAS for summary judgment declaring unlawful the Forest Service's proposal to long northern spotted owl habitat without complying with NFMA is granted. The agency's failure to date to comply, or begin compliance, with NFMA requirements is arbitrary and capricious, and not in accordance with law. The same motion in regard to NEPA is moot since NFMA directs that the NEPA procedures be followed. The motion in regard to MBTA is denied since that statute is inapplicable. The Forest Service's cross-motions on the same subjects are denied in part and granted in part accordingly.

2. SAS's motion for summary judgment determining that the December 1988 ROD violates the environmental statutes is denied because the ROD has been withdrawn. The Forest Service's cross-motion for a determination that no case or controversy exists is granted, and SAS's claims seeking relief as to the now-discarded ROD are dismissed without prejudice.

3. The Forest Service's motion to dismiss WCLA's complaint, on the ground that no case or controversy

presently exists, is granted, and that complaint is dismissed without prejudice.

4. SAS's motion for summary judgment as to five sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed, is denied without prejudice because no case or controversy is now presented.

XI.

HEARING AS TO INJUNCTIVE RELIEF

Oral argument as to what injunctive relief, if any, should be ordered in light of the foregoing rulings, and as to whether any basis exists to amend the December 18, 1990, order enjoining the award of twelve timber sales, will be held at 8:00 a.m. on March 12, 1991. Counsel should plan on having twenty minutes per side. Counsel from outside the district, or who cannot be present, may take part by telephone. No additional briefs are to be filed in advance of the hearing.

The clerk is directed to send copies of this order to all counsel of record.

Dated: March 7, 1991.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX C

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY; PILCHUCK AUDUBON SOCIETY; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON NATIVE PLANTS SOCIETY; OREGON NATURAL RESOURCES COUNCIL, INC.; PORTLAND AUDUBON SOCIETY; LANE COUNTY AUDUBON SOCIETY; Plaintiffs-Appellants, WASHINGTON CONTRACT LOGGERS ASSOCIATION; WILLIAM PICKELL, Plaintiffs-Appellees, vs. F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, Defendants-Appellees.	No. 90-35774 D.C. No. CV-89-16-WLD OPINION FILED APR 23 1991

Appeal from the United States District Court for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted February 11, 1991
San Francisco, California

Filed: April 26, 1991

Opinion by Judge Harry Pregerson

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

We have before us once again the controversy over logging of the old growth forests of the Pacific Northwest and the impact of the logging on the northern spotted owl. Today's dispute is a consequence of our recent decision in this very case, which we filed on September 18, 1990, and amended on October 30. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). We held that Congress violated the separation of powers doctrine when it enacted section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) ("Section 318").[1] A few days after our mandate issued, Seattle Audubon Society and other plaintiff organizations challenged the United States Forest Service's decision to allow logging on six tracts of old growth forest. The district court held that these six challenges were untimely. We reverse.

I.

The logging of old growth forests poses a grave danger to the continued survival of the northern spotted owl. This litigation began as a challenge to the Forest Service's 1988 administrative decision to continue logging in the thirteen national forests of Oregon and Washington where spotted owls still survive. The decision was

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[1] More specifically, we held that the first sentence of subsection (b)(6)(A) violated the Constitution. 914 F.2d at 1317.

set out in a December 8, 1988 Record of Decision (ROD) signed by the Chief of the United States Forest Service, and in an accompanying Final Supplement to the Environmental Impact Statement for an Amendment to the National Regional Guide. Although the plan did not authorize logging in designated Spotted Owl Habitat Areas, the plaintiffs contend the plan's protections are wholly inadequate and are based on a flawed evaluation of the danger that continued logging poses to the owl's habitat. In early 1989, the plaintiffs filed suit United States District Court in Seattle and asked for declaratory and injunctive relief. The complaint alleged that by adopting the plan, the Forest Service violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Migratory Bird Treaty Act (MBTA).[2]

The Washington Contract Loggers Association also challenged the Forest Service's Plan in the United States District Court in Seattle. It contended that the plan did not permit enough logging. The district court denied the loggers' motion for a preliminary injunction and

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[2] Plaintiffs contend that the plan violates the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988), by failing to consider adequately the [sic] how the planned logging would affect the spotted owl. It allegedly violates the National Forest Management Act, 16 U.S.C. §§ 1600-1687 (1988), by failing to assure that a viable population of northern spotted owls will be maintained. Finally, the plaintiffs contend that the plan violates the Migrating Bird Treaty Act, 16 U.S.C. §§ 703-712 (1988), by allowing harm to the owls or their habitat.

consolidated their case with the litigation filed by Seattle Audubon Society.[3]

In March 1989, the district court granted Seattle Audubon's motion for a preliminary injunction against 163 specified timber sales. In May 1989, the court preliminarily enjoined all sales of timber that comprised more than forty acres of old-growth forest.

With this injunction against significant sales of the Forest Service's old-growth forest in place, and with a similar lawsuit on behalf of the spotted owl pending against the Bureau of Land Management in United States District Court in Portland,[4] Congress took action. In enacting section 318, "The Northwest Timber Compromise of 1989," Congress declared that it attempted to balance the goals of ensuring a predictable supply of timber, protecting the northern spotted owl, and preserving significant stands of old-growth forest. H. R. Conf.

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[3] In this appeal, the loggers defend the decision of the district court, and we therefore regard them as defendants.

[4] The Portland Audubon Society and other environmentalist and conservationist organizations, some of which are also plaintiffs in the case before us today, sued in Portland to protect the northern spotted owl on land administered by the Bureau of Land Management. That lawsuit, filed in 1987, has been before us two separate times at the time Congress passed Section 318, the legislation that we must interpret again today. *See Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 109 S. Ct. 3229 (1989); *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990). When the Portland case was before us a third time in 1990, we consolidated it with the Seattle litigation and issued the ruling on section 318 that we follow up on today. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990).

Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). Congress enacted section 318 as a temporary measure to govern the old-growth forests until the end of the fiscal year, September 30, 1990. Section 318(a)(1) required that the Forest Service offer 7.7 billion board feet of timber for sale from the national forests of Oregon and Washington, with 5.8 billion board feet to come from the thirteen national forests that contain northern spotted owls.[5] In subsection (b)(3), the Act provided that no logging would be permitted in areas designated as Spotted Owl Habitat Areas (SOHAs) in the Forest Service plan adopted in 1988. Subsection (b)(3) also increased the size of several specified SOHAs, thus setting aside additional acreage where logging would be banned. Subsection (b)(3)(F) referred to the 1988 forest management plan and provided that "[a]ll other standards of guidelines contained in the Chief's Record of Decision are adopted."

Section 318 included some substantive and procedural criteria to guide the Forest Service in selecting areas of the forest for logging. For example, subsection (b)(1) instructed the Forest Service to minimize fragmentation of ecologically significant old growth forest that contains northern spotted owls. It also provided that location of proposed timber sales would be reviewed by advisory panels of local citizens with diverse views, and

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[5] Section 318(a)(2) set a timber sales quota for the Bureau of Land Management. In this opinion, we discuss only the provisions of section 318 that apply to the Forest Service and the litigation challenging its management of the old-growth forests.

it required the Forest Service to consider the input provided by these citizen groups.

In subsection (g), section 318 provided for expedited judicial review of administrative decisions to offer particular tracts of timber for sale. It required that challenges to a timber sale be filed in district court within fifteen days of its advertisement. It further provided that courts could not temporarily restrain or preliminarily enjoin administrators from carrying out decisions made during fiscal year 1990 to sell timber in forests inhabited by spotted owls. Courts retained, however, the power to permanently enjoin, modify, or void a proposed timber sale that was arbitrary, capricious, or otherwise not in accord with the law. Subsection (g) further provided that challenges to timber sales would take priority on the calenders of district courts, which were required to rule on the merits within forty-five days, unless the Constitution required more time.

The focus of our recent decision was subsection (b)(6)(A), where Congress attempted to overrule the preliminary injunction issued by the district court judge in this case. In subsection (b)(6)(A), Congress identified this lawsuit by its case name and its docket number in the district court. Congress declared that management of Forest Service land in accordance with the guidelines of subsection (b)(3) adequately satisfied the requirements of the statutes on which the plaintiffs based their complaint.[6]

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[6] Subsection (b)(6)(A) referred generally to the statutes upon which the plaintiffs relied without specifically

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Section 318 became law on October 23, 1989. On November 6, the district court concluded that subsection (b)(6)(A) required that it vacate its preliminary injunction. It ruled that Congress had temporarily suspended, during fiscal year 1990, the environmental laws that the plaintiffs invoke in this litigation. The district court did not dismiss the case but retained jurisdiction, expecting the controversy to resume after the end of fiscal year 1990.[7]

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mentioning the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. The portion of subsection (b)(6)(A) relevant to the Seattle litigation provided:

> Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide – Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 . . . , the Congress hereby determines and directs that management of areas according to subsection[] (b)(3) . . . of this section on the thirteen national forests in Oregon and Washington . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction). . . .

Pub. L. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989).

[7] The court noted that subsection 318(g) provided for expedited review of decisions to offer particular timber sales.

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On appeal, we reversed and held that courts cannot give effect to the first sentence of subsection (b)(6)(A). We explained that Congress violated the separation of powers doctrine by attempting to dictate to the judiciary how to decide the outcome of a pending case. We acknowledged that Congress has the power to affect the outcome of a pending case by amending the legislation upon which the litigants rely. We concluded, however, that Congress had not amended the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. Because those statutes were still in place, it was the job of the judiciary, not the Congress, to determine whether the actions of the Forest Service complied with those statutes. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). Our mandate issued on September 24, 1990.

Within three days, the plaintiffs challenged six timber sales as violating provisions of the National Environmental Policy Act, the National Forest Management Act, and the Migratory Bird Treaty Act. They asked for a permanent injunction. The plaintiffs acknowledged that their challenges were not filed within fifteen days of the initial

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The court announced that the parties could challenge particular sales under subsection (g) by filing motions instead of initiating new lawsuits. Accordingly, when Seattle Audubon alleged that particular Fiscal Year 1990 timber sales violated the non-fragmentation provisions of section 318, it proceeded by filing motions for partial summary judgment in this already pending case. Similarly, the challenge to the six sales before us today was initiated by a motion for partial summary judgment.

advertisement of the timber sales, as required by subsection (g) of section 318. Without disputing the general applicability of the 15-day limitations period, plaintiffs argued that the doctrine of equitable tolling should excuse their late challenges. They argued that the limitations period should be tolled during the time that their challenge to the constitutionality of subsection (b)(6)(A) was pending before this court. The district court ruled that the doctrine of equitable tolling did not apply to the 15-day limitations period of subsection (g). It further ruled that even if the limitations period could be equitably tolled, the plaintiffs were not entitled to the benefits of the doctrine in this case. We have jurisdiction over this timely interlocutory appeal under 28 U.S.C. § 1292(a)(1) (1988).

II.

Plaintiffs do not challenge the applicability of the fifteen-day limitations period. For the purposes of this appeal, we therefore assume, without deciding, that this limitations period ordinarily governs challenges to Fiscal Year 1990 timber sales that are based on the National Environmental Policy Act, the National Forest Management Act, and the Migratory Bird Treaty Act.[8] The

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[8] Congress clearly intended the fifteen-day limitations period to apply to challenges that asserted that a Fiscal Year 1990 timber sale violated provisions of section 318. For example, subsection (g) provides only fifteen days to file a claim alleging that a proposed sale violates 318(b)(1) by failing to minimize fragmentation of old-growth forest. It is not so clear, however, that Congress intended subsection (g) to apply to

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question before us is whether the doctrine of equitable tolling applies to the fifteen-day limitations period. Because we answer that question in the affirmative, the next question is whether the limitations period should be tolled in this particular case. Ordinarily, that is a question for the district court in the first instance. We reach that question today, however, because the district court has already considered it in its alternative holding.

A.

When the district court ruled that the principles of equitable tolling did not apply, it did not have the benefit of the Supreme Court's recent decision in *Irwin v. Veterans Administration*, 111 S. Ct. 453 (1990). *Irwin* simplifies the first stage of our inquiry. The Court held that whenever Congress waives the government's sovereign immunity and permits suit against the government, there is a rebuttable presumption that the doctrine of equitable tolling applies. *Id.* at 457.

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claims based on the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. By enacting the unconstitutional subsection (b)(6)(A), Congress apparently intended to bar altogether any claims based on these three statutes. In our earlier decision, we declined to give effect to that intent, and we made it clear that plaintiffs are entitled to pursue their claims under these three statutes. *See Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). We have not yet had to decide whether our earlier decision affects the scope of what is otherwise the plain language of subsection (g). Nor do we decide that question today.

There is nothing in the text of section 318 itself to rebut the presumption that equitable tolling applies to the fifteen-day period. Nor do we find that permitting equitable tolling in appropriate cases would be inconsistent with the purposes of section 318. Congress clearly intended to preserve the opportunity for judicial review of timber sales offered during the fiscal year. Congress directed the Forest Service to harvest a specified quantity of timber, but it did not authorize the agency to fulfill its mission arbitrarily, capriciously, or otherwise in violation of law. Equitable tolling is completely consistent with the goal of a legal timber harvest. Congress also intended that court challenges be completed quickly, and it therefore provided for expedited procedures. Although permitting equitable tolling may sometimes interfere with the goal of expedition, it may advance Congress's goal of ensuring that timber sales comply with the law. We cannot conclude that Congress's preference for proceeding with dispatch overrides its goals of preserving the usual opportunity to assure that timber harvesting complies with all applicable law. We therefore conclude that the fifteen-day limitations period is subject to equitable tolling in an appropriate case.

B.

Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time. An excellent discussion of the application

of these principles of equitable tolling can be found in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549-50 (N.D. Cal. 1987).

Plaintiffs argue that extraordinary circumstances beyond their control prevented them from challenging these timber sales within fifteen days of their advertisement for sale. The extraordinary circumstances, they contend, were that an unconstitutional statute, subsection (b)(6)(A), and the district court's erroneous upholding of that statute, barred them from filing the claims they now seek to litigate. They argue that the limitations period was equitably tolled until we reversed the district court by holding that subsection (b)(6)(A) was unconstitutional.

Courts have held that when external forces, rather than plaintiff's lack of diligence, account for the failure to file a timely claim, equitable tolling is proper. When courts have actually been closed by conditions of war, statutes of limitations are equitably tolled. *See Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867) (courts in southern states closed during Civil War). Similarly, when war prevents a plaintiff from gaining access to a court that has remained open, the principles of equitable tolling apply. *See Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947) (plaintiff held in Japan during the Second World War unable to file his claim in court). In *Osbourne*, the court explained:

> All statutes of limitations are based on the assumption that one with a good cause of action will not delay in bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis for the assumption has been destroyed.

Id. at 769, *quoted in Forti v. Suarez-Mason*, 672 F. Supp. at 1550. Even when physical access to a functioning court is possible, equitable tolling may nevertheless be proper if there is no real possibility of gaining relief in court. *See Suarez-Mason*, 672 F. Supp. at 1550.

Plaintiffs rely on *Osbourne* and argue that until our decision of September 18, 1990, they were effectively denied access to the courts by circumstances beyond their control. They contend that they were barred from bringing their claims by the unconstitutional enactment of subsection (b)(6)(A) and the district court's erroneous enforcement of it. Under the district court's ruling of November, 1989, the plaintiffs had no claims under the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act. The court ruled, erroneously, that Congress had amended these statutes to excuse the very violations of law that plaintiffs sought to redress.

Plaintiffs diligently appealed that ruling. Within a few months, while that appeal was still pending, the district court reiterated its position when ruling on a separate motion. On January 30, 1990, the court declared that during fiscal year 1990, it would test the legality of Forest Service actions in the national forests containing spotted owls solely by the provisions of section 318. Any claims based on the National Environmental Policy Act, the Migratory Bird Treaty Act, or the National Forest Management Act would be dismissed on the court's own motion, without requiring the defendants to file briefs.

After the court's order of January 30, plaintiffs filed challenges to some Fiscal Year 1990 timber sales on the

grounds that they violated provisions of section 318. For example, plaintiffs challenged some sales on the grounds that the Forest Service failed to minimize fragmentation of ecologically significant old-growth forest, in violation of 318(b)(1). The plaintiffs did not, however, base any challenges on the National Environmental Policy Act, the National Forest Management Act, or the Migratory Bird Treaty Act until after our decision of September 18, 1990. Our mandate in that case issued on September 24, and within three days the plaintiffs filed the challenges before us today.

The defendants contend that plaintiffs were not denied access to the courts. They maintain that nothing barred challenges based on NEPA, NFMA, or the MBTA except the plaintiffs' lack of diligence. The fact that the statute purported to remove the legal grounds for plaintiffs' challenges, defendants contend, merely shows that plaintiffs risked losing any challenges they might file. Defendants contend that the prospect that a lawsuit will be unsuccessful does not merit tolling of the statute of limitations. Defendants apparently contend that the plaintiffs could be regarded as diligent only if, while their appeal was pending in this court, they had separately challenged each timber sale in the district court within the fifteen-day limitations period, notwithstanding the district court's warning that such challenges would be summarily dismissed.

In light of the purpose of statutes of limitations and the particular circumstances of this unusual case, we cannot say that the plaintiffs were not diligent. At all times, the defendants were on notice of the plaintiffs' claims that subsection (b)(6)(A) was unconstitutional and

that the plans for logging violated NEPA, NFMA, and the MBTA. The plaintiffs were diligently pursuing their challenge to the constitutionality of (b)(6)(A) in the appellate court. Under the procedures the district court announced at the time it upheld subsection (b)(6)(A), any challenges to individual timber sales would be filed as motions for partial summary judgment. *See supra* note 7. We do not accept defendants' contention that, while that appeal was pending, plaintiffs slept on their rights by failing to file a separate motion for summary judgment each time they believed a timber sale violated the three statutes that the district court erroneously believed had been temporarily repealed. The district court's view that subsection (b)(6)(A) was constitutional was already the law of the case. It was clear that the district court would have dismissed each separate motion.

The logical corollary of defendants' overly strict view would further hold that plaintiffs could have diligently preserved their rights only by separately appealing each dismissal of a challenge. We do not believe that the equitable principles that govern tolling would require such a waste of judicial resources. Plaintiffs should not have to file multiple appeals raising the same legal issue against the same defendants in the same case. Under the circumstances, we agree that the unconstitutional statute and the district court's erroneous interpretation of it barred these otherwise diligent plaintiffs from raising the claims they now seek to litigate. We conclude that they meet the threshold requirements for equitable tolling.

We also conclude that the defendants will not be unjustly prejudiced by tolling the statute of limitations. This is certainly not a case in which they will be forced to

defend a stale claim. Memories have not faded. Witnesses have not disappeared. Documents are accessible. The defendants can argue that they were prejudiced only if they relied to their detriment on the fact that no challenge was filed within the fifteen-day limitations period. The loggers argue that the expedited process of subsection (g) allowed buyers of timber to be "certain" that a sale unchallenged after fifteen days was "immune" from litigation. We disagree. The buyers of timber did not sign contracts with any such expectation of immunity. A recision clause permits the government to terminate the contracts to comply with a court order, even if the particular sale is not named in that order. The timber buyers knew that the plaintiffs were vigorously contesting the Forest Service's logging plans on a number of legal fronts, including the appeal that resulted in our decision of September 18, 1990. We do not believe that any buyers of timber reasonably relied on a belief that the expiration of the fifteen-day period rendered the sales immune from challenge. We therefore conclude that equitable tolling would not unjustly prejudice the Washington Contract Loggers Association.

The Forest Service argues that equitable tolling would prejudice its efforts to meet the timber harvest quota that Congress set for Fiscal Year 1990. Because the fiscal year has already expired, the Forest Service will be unable to substitute other unsold tracts for any sales that the plaintiffs might successfully challenge. We conclude, however, that any prejudice to the Forest Service's efforts cannot be traced to a decision to toll the limitations period. The Forest Service failed to fulfil the timber quota set by section 318. *See Gifford Pinchot Alliance v. Butruille,*

752 F. Supp. 967, 972 (D. Or. 1990). Because the agency was trying its best to fulfill the Congressional directive to offer 7.7 billion board feet for sale, *id.*, we can conclude that any unsold tracts of timber that could have been prepared for sale in fiscal year 1990 were indeed prepared and offered for sale. The Forest Service could not have substituted other tracts for the ones challenged here. Thus, the Forest Service did not rely to its detriment on the fact that these particular sales were not challenged within the fifteen-day limitations period. The Forest Service's "prejudice" argument is really an argument that the environmental statutes themselves – not our decision to toll – interfere with the agency's efforts to meet the timber harvest quota.

We conclude that the plaintiffs in this case did not sleep on their rights. Their diligent efforts to litigate their claims were blocked in the district court until we declared subsection (b)(6)(A) unconstitutional and explained that nothing in section 318 amended the environmental statutes upon which plaintiffs rely. Equitable tolling in this case will not interfere with the purposes of limitations periods and will not cause unjust prejudice to the defendants. We therefore conclude that the plaintiffs' challenges to the six timber sales can proceed.

III.

In a footnote in their reply brief, plaintiffs suggest that a ruling in their favor will also function to equitably toll the remainder of the fifteen-day period during the

entire time this appeal has been pending before us.[9] We disagree. The district court should have the first opportunity to consider whether equitable tolling is proper in a given case, and it has had no opportunity to consider whether the remainder of the fifteen-day period should be tolled during the pendency of this appeal. The reasoning of today's opinion does not automatically determine whether the limitations period should be tolled during the time this appeal has been pending. The issues are different. For example, plaintiffs cannot argue that an unconstitutional statute barred new challenges to timber sales during the entire time this appeal has been before us.[10] Moreover, we do not believe that a footnote in a

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[9] Plaintiffs calculate that if we accepted their position, they would have seven additional days to file challenges to any 1990 timber sales governed by the fifteen-day limitations period of subsection (g). They base these calculations on two premises. The first premise is that the fifteen-day period was tolled until September 24, 1990, when we issued the mandate after filing our opinion of September 18. Second, plaintiffs contend that the tolling resumed on October 2, 1990, when they filed their notice that they were appealing, the district court's ruling that equitable tolling did not apply. Plaintiffs' first premise is correct. We express no opinion on the second.

[10] Plaintiffs have argued in this case that until we issued our opinion of September 18, 1990, they were barred from pursuing their claims by the operation of an unconstitutional provision in subsection (b)(6)(A). After we issued our opinion of September 18, and certainly after we clarified and amended it on October 30, neither the statute itself nor the district court's interpretation of the statute prevented the plaintiffs from challenging 1990 timber sales on the grounds that they violated the National Environmental Policy Act, the Migratory Bird Treaty Act, or the National Forest Management Act. The

(Continued on following page)

reply brief properly raised the issue whether the limitations period should be tolled while this appeal is pending. Today's decision, therefore, holds only that the doctrine of equitable tolling permits the plaintiffs to challenge the six timber sales involved in this appeal.

IV.

The order of the district court is vacated, and this case is remanded for further proceedings. The parties will pay their own costs. The mandate shall issue immediately.

COUNSEL PAGE

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(Continued from previous page)

plaintiffs' claim that the fifteen day limitations period is tolled during the entire time this appeal has been pending amounts to an argument that the district court, by ruling that equitable tolling did not apply, had effectively barred plaintiffs from the courts. This separate question has not been briefed and is not before us.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. JOHN L. EVANS, et al., Defendants. and WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Intervenors.	NO. C89-160WD ORDER ON SAS'S RENEWED MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION RE SIX TIMBER SALES FILED MAY 24 1991

Plaintiffs Seattle Audubon Society, et al., ("SAS") have renewed their motion for summary judgment declaring that defendants John L. Evans, et al., ("Forest Service") have violated certain federal statutes, and for injunctive relief, in regard to six fiscal year 1990 timber sales that include northern spotted owl habitat. This court originally held the challenges to these six sales barred by the fifteen-day statute of limitations of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"). The court of appeals reversed, holding that the statute of limitations was equitably tolled. *Seattle Audubon Society, et al., v. Robertson*, No. 90-35774 (9th Cir. 1991). The Forest

Service and intervenors Washington Contract Loggers Association, et al., ("WCLA") oppose the renewed motion. All materials filed in support of or opposition to the motion, and the arguments of counsel presented by telephone conference call on May 24, 1991, have been fully considered.

The law on this subject is set out in the Order on Motions Heard December 5, 1990 (Dec. 18, 1990) (Dkt. # 757), and the Memorandum Decision and Injunction entered on May 23, 1991 (Dkt. # 937).

Of the six sales now at issue, two have not been awarded. These are the Horse Byars and Median Buyback sales. Two others have been awarded but operation of them has not begun. These are the Louise and Wings sales. Two sales were awarded in September 1990, expenses have been incurred in their operation, and logging has begun. These are the Coon Skinner and High Spud sales. On the Coon Skinner sale, logging has been completed on 75 of the 114 acres. As to these two, but not as to the others, the balance of equities is against the issuance of an injunction.

Accordingly, it is ordered and adjudged that:

1. SAS's motion for summary judgment declaring that the six sales in issue have been offered by the Forest Service in violation of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, is granted for the reasons stated in the Order on Motions Heard December 5, 1990 (Dkt. # 757) and in the Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991) (Dkt. # 824). The Forest Service's cross-motion for summary judgment is denied.

2. The Forest Service is enjoined, for the reasons stated in the December 18, 1990, March 7, 1991, and May 23, 1991 orders cited above, from further awarding or operating the Wings, Louise, Median Buyback, and Horse Byars timber sales until it complies with NFMA as heretofore ordered.

3. SAS's motion for an injunction as to the Coon Skinner and High Spud sales is denied.

The clerk is directed to send copies of this order to all counsel of record.

Dated: May 24, 1991.

/s/ William L. Dwyer
Judge William L. Dwyer
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUBUDON [sic] SOCIETY, CENTRAL OREGON AUBUDON [sic] SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUBUDON [sic] SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,

Defendant,

and

NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN & WRIGHT LOGGING CO., FRERES LUMBER CO., INC., LONE ROCK TIMBER CO., INC., SCOTT TIMBER CO., CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, INC., ASSOCIATION OF O & C COUNTIES and BENTON COUNTY, DOUGLAS COUNTY FOREST PRODUCTS COMPANY, MEDFORD CORPORATION, ROGGE FOREST PRODUCTS, INC.,

Defendant-Intervenors.

Civil No. 87-1160-FR

OPINION

FILED MAY 8 91

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FRYE, Judge:

The motions pending before the court are:

1) plaintiffs Portland Audubon Society, et al.'s motion for summary judgment and injunctive relief (#530);

2) defendant Manual Lujan's second motion for summary judgment (#554);

3) defendant-intervenor Association of O & C Counties and Benton County's motion to strike plaintiffs' statement of undisputed facts (#571);

4) defendant-intervenor Association of O & C Counties and Benton County's motion for partial summary judgment (#585); and

5) defendant-intervenor Northwest Forest Resource Council's motion for summary judgment (#589).

BACKGROUND

This is an action for declaratory and injunctive relief brought by plaintiffs, Portland Audubon Society, Headwaters, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Salem Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council. In the complaint filed on October 19, 1987, plaintiffs alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Oregon & California Lands Act (OCLA), 43 U.S.C. § 1181; the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 *et seq.*; and the Administrative Procedures Act (APA), 5 U.S.C. §§ 553 *et seq.*

In their first claim for relief under the NEPA, plaintiffs challenged the April 10, 1987 decision of the Director of the Bureau of Land Management (BLM) for the State of Oregon not to prepare a Supplemental Environmental Impact Statement prior to the completion of a new Environmental Impact Statement which was expected to be completed by the fall of 1990. This court concluded that there was significant new information about the ability of the northern spotted owl to survive as a species. The court found that the April 10, 1987 decision of the Director of the BLM for the State of Oregon not to prepare a Supplemental Environmental Impact Statement was "arbitrary and capricious and in violation of NEPA," but concluded that Section 314 of Pub. L. 100-446, 102 Stat. 1774, 1825 (1988) barred plaintiffs' NEPA claim. *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989).

On September 6, 1989, the United States Court of Appeals for the Ninth Circuit issued a mandate affirming this court's denial of relief to plaintiffs on their NEPA claim and reversing and remanding the other claims for further proceedings. The Court of Appeals concluded that this court had correctly held that Section 314 bars the NEPA claim of plaintiffs, but concluded that this court erred in holding that the other claims of plaintiffs were untimely. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989).

On remand, plaintiffs moved the court for summary judgment on their claims under the OCLA and the MBTA. Defendant and intervenors moved the court to dismiss the action on the grounds that Section 318 of the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121 (October 23, 1989), required dismissal of these claims. This court granted the motions of defendant and intervenors to dismiss on the grounds that Section 318 required dismissal of these claims. The Court of Appeals for the Ninth Circuit concluded that the first sentence of Section 318 upon which this court relied in dismissing the OCLA and the MBTA claims violated the doctrine of separation of powers and reversed and remanded the case once again to this court for further proceedings consistent with the opinion of the Court of Appeals. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990).

FINDINGS OF FACT

The date for the BLM to complete new management plans is now October 1, 1992. The 1987 decision of the

Director of the BLM for the State of Oregon not to prepare a Supplemental Environmental Impact Statement only applies to a three-year period ending in fiscal year 1990; therefore, the BLM was required to determine how to proceed for the remaining two-year period – fiscal years 1991 and 1992.

On September 25, 1990, Cy Jamison, Director of the BLM, announced that for fiscal years 1991 and 1992 the BLM would follow the conservation strategy of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl (ISC), chaired by Jack Ward Thomas, and would avoid all timber harvesting within any of the 749,000 acres of BLM land denoted as habitat conservation areas in the report of the ISC. The ISC was established under the authority of an agreement in August, 1988 between the National Park Service, the Forest Service, the BLM, and the Fish and Wildlife Service to develop a scientifically credible conservation strategy for the northern spotted owl. In its report, the ISC concluded that the northern spotted owl was in peril over significant portions of its range because of the loss of habitat from logging and natural disturbances. The ISC proposed a two-part conservation strategy.

The first stage of the conservation strategy proposed by the ISC was to protect adequate amounts of appropriately distributed habitat to ensure the long-term survival of the northern spotted owl. The second stage of the conservation strategy of the ISC was to research and monitor the adequacy of the strategy and to seek ways to sustain and produce suitable owl habitat in managed forests.

The only departure of the BLM from the conservation strategy of the ISC report was its decision to apply a rule, known as the "50-11-40 rule", for the management of forest lands between habitat conservation areas on an optional rather than on a mandatory basis. The 50-11-40 rule requires that each quarter township (nine square miles) of federal land have 50% of its forested land composed of trees eleven or more inches in diameter with a 40% "canopy closure" (the percentage of sky covered by trees when looking up). The BLM agreed to observe the 50-11-40 rule for much of its timber harvesting, but not for all of it.

In addition to avoiding timber sales in the habitat conservation areas proposed by the ISC report, the BLM agreed not to conduct timber sales in any of the 122 management areas identified in its 1983 agreement with the Oregon Department of Fish and Wildlife. In fiscal year 1991-92, the BLM agreed to consult with the United States Fish and Wildlife Sevice [sic] on all timber sales which may affect northern spotted owls as required under Section 7 of the Endangered Species Act, 16 U.S.C. § 1535(a)(2).

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production

of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

CONTENTIONS OF THE PARTIES

Plaintiffs contend that they are entitled to summary judgment in their favor on their claims for relief under the NEPA and the MBTA. Plaintiffs ask the court to declare the conduct of the BLM to be in violation of the NEPA and the MBTA and to issue a permanent injunction requiring the BLM to immediately commence preparation of an Environmental Impact Statement as required by the NEPA. Plaintiffs seek an injunction prohibiting the sale of timber in the habitat of the northern spotted owl pending completion of such Environmental Impact Statement and pending the promulgation of appropriate regulations by the Secretary of the Interior governing activities under the MBTA.

Defendant, Manual Lujan, Jr., in his official capacity as Secretary of the United States Department of Interior, contends that summary judgment should be entered in his favor as to all claims in this action and that no injunction should be entered. Intervenors, the Association of O & C Counties and Benton County and the Northwest Forest Resource Council, contend that summary judgment should be entered in defendant's favor as to all claims in this action.

ANALYSIS AND RULING

National Environmental Protection Act (NEPA)

Plaintiffs argue that this court's holding in *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989), entitles them to relief on their NEPA claim. Plaintiffs point out that the BLM has not addressed in any NEPA document any of the new information about the potential extinction of the northern spotted owl, and therefore this court should order the BLM to prepare an Environmental Impact Statement.

Defendant and intervenors argue that there is no NEPA claim before this court. Defendant and intervenors explain that this court has dismissed the NEPA claim, and the Court of Appeals has affirmed that dismissal, remanding only non-NEPA claims to this court for further proceedings.

In *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1242 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1470 (1990), the Court of Appeals affirmed this court's dismissal of the NEPA claim. The Court of Appeals reversed and remanded for further proceedings only the non-NEPA claims. There is no NEPA claim now before this court because the dismissal of the NEPA claim by the Court of Appeals is the law of this case.

Oregon & California Lands Act (OCLA)

In their second claim for relief, plaintiffs allege that the failure of the BLM to analyze the effect of its timber sale program on the northern spotted owl and the BLM's Forest Resource Policy Statement which precludes the

BLM from withdrawing lands otherwise suitable for commercial logging in order to provide habitat for the northern spotted owl violates the OCLA. Defendant and intervenors argue that any relief sought by plaintiffs is foreclosed by the holding in *Headwaters, Inc. v. BLM*, 914 F.2d 1174 (9th Cir. 1990) (petition for rehearing pending).

In *Headwaters*, the BLM concluded that the impacts of permitting the sale and the logging of the Wilcox Peak timber area were within the impacts anticipated by the regional Environmental Impact Statement; that the Wilcox Peak timber area did not present significant unique environmental concerns; and that, therefore, a site-specific Supplemental Environmental Impact Statement was not required. Headwaters, an environmental group, challenged the decision of the BLM not to prepare a site-specific Supplemental Environmental Impact Statement for the Wilcox Peak timber sale.

On appeal, Headwaters argued that the failure of the BLM to file a site-specific Supplemental Environmental Impact Statement violated the OCLA because the OCLA required the BLM to manage the Wilcox Peak timber area for multiple uses, including wildlife conservation, rather than just for timber production. However, in its ruling, the court explained:

> We have previously observed that "[t]he provisions of 43 U.S.C. § 1181a make it clear that the primary use of the [O & C Act] lands is for timber production to be managed in conformity with the provision of sustained yield." *O'Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987); *see also Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir.) (Skoko) (The O & C act "provided that most of the O & C lands would henceforth be

managed for sustained-yield timber production."), *cert. denied*, 444 U.S. 927, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979).

While these statements are arguably dicta, we are convinced of their accuracy. 43 U.S.C. § 1181a states that O & C Act lands

> shall be managed, except as provided in section 1181c of this title [since repealed], for permanent forest production, and *the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield* for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties.

(Emphasis added.) Headwaters argues that the phrase "forest production" in section 1181a encompasses not merely timber production, but also conservation values such as preserving the habitat of the northern spotted owl. However, Headwaters's proposed use – exempting certain timber resources from harvesting to serve as wildlife habitat – is inconsistent with the principle of sustained yield. As the statute clearly envisions sustained yield harvesting of O & C Act lands, we conclude that Headwaters's construction is untonable. There is no indication that Congress intended "forest" to mean anything beyond an aggregation of timber resources.

914 F.2d at 1183.

In *Headwaters*, the Ninth Circuit concluded that the OCLA does not "suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of

the O & C Act at all," contrary to the position of Headwaters that the OCLA was a multiple use statute. *Id.* at 1184.

The position of plaintiffs in this case is based upon the identical legal issues resolved against their position in the *Headwaters* case. There are no disputed factual issues in this case. *Headwaters* resolved the legal issues presented in this case under the OCLA. *Headwaters* precludes plaintiffs from the relief they seek under their second claim for relief.

Federal Lands Policy and Management Act (FLPMA)

In their third claim for relief, plaintiffs allege that the Forest Resource Policy Statement of the BLM, which precludes the BLM from withdrawing lands otherwise suitable for commercial logging in order to provide habitat for the northern spotted owl, violates the multiple-use mandate of the FLPMA. Defendant and intervenors move the court for judgment in their favor on the ground that the identical legal issue was resolved in the *Headwaters* case.

Plaintiffs argue here that their claim that the BLM failed to analyze the effect of its entire timber sale program on the northern spotted owl is materially different from the claim in *Headwaters,* which was that the Wilcox Peak Environmental Impact Statement did not address and consider a recently discovered pair of owls in the vicinity of the proposed sale. Plaintiffs assert that the decision of the court in *Headwaters* does not affect this litigation.

The FLPMA prescribes management objectives for lands in the public domain. Under the FLPMA, the BLM must make an inventory of the resource values of land in

the public domain and select "that use or combination of uses which will best achieve the objectives of multiple use." 43 C.F.R. § 1725.3-1 (1987); 43 U.S.C. § 1711(a). The BLM is directed " 'to manage the public lands on a multiple use basis making the most judicious use of the land for some or all of the public land resources and using some land for less than all of the resources, where appropriate.' " *Headwaters*, 914 F.2d at 1182, *quoting Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982) (emphasis, citations, and internal quotations omitted).

In *Headwaters*, the Court of Appeals affirmed the decision of the district court that the multiple use analysis prepared by the BLM pursuant to the FLPMA adequately considered " 'all pertinent factors, including, but not limited to, ecology, existing uses, and the relative values of the various resources in particular areas.' " District Court opinion, *quoting* 43 C.F.R. § 1725.3-1 (1987). The Ninth Circuit concluded that "[t]his finding is supported by the language of the management plan and by testimony presented at trial, and is not clearly erroneous." 914 F.2d at 1182.

The trial court's finding in *Headwaters* that the BLM had complied with the requirements of the FLPMA was a factual determination based upon the application of the requirements of the FLPMA to the management plan of the BLM. The decision in *Headwaters* has no collateral estoppel effect upon the court in this case because neither party has addressed the factual issues underlying the FLPMA claim in this case. Defendant's motion for summary judgment on this claim is denied.

Migratory Bird Treaty Act (MBTA)

The MBTA provides, in part, that "[u]nless and except as permitted by regulation . . . it shall be unlawful at any time, by any means or in any manner, to . . . take, capture, kill, [or] attempt to take, capture, or kill . . . any migratory bird." The northern spotted owl is a migratory bird as defined by the regulations. 50 C.F.R. § 10.13. Plaintiffs correctly point out that, in its own documents, the BLM recognizes that the planned timber sales in the habitat of the northern spotted owl will result in the deaths of owls. The issue before the court is whether the deaths of owls, which are caused by the destruction of their habitat, violates the MBTA.

In *Seattle Audubon Soc'y v. Robertson*, No. C89-160WD (W.D. Wash. March 7, 1991), the court found that the timber management plans of the United States Forest Service did not violate the MBTA by allowing the logging of the habitat of the northern spotted owl. The court explained:

> Whether the Forest Service's timber management plan, or timber sales fashioned pursuant to it, violate MBTA depends on the interpretation of "taking." Under the regulations promulgated pursuant to MBTA, to "take" is to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12. Under [the Endangered Species Act (ESA)], to "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" under ESA means
>
> > an act which actually kills or injures wildlife. Such act may include significant habitat

> modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

> [Seattle Audubon Society] asks the court to engraft ESA's broader definition of a "taking" onto MBTA. It relies upon a Supreme Court case declaring protection of migratory birds to be a "national interest of very nearly the first magnitude," *State of Missouri v. Holland*, 252 U.S. 416 (1920), and another stating that ESA sheds light upon similar terms in MBTA, *Andrus v. Allard*, 444 U.S. 51, 62 (1979).
>
> But the differences between a "taking" under ESA and MBTA are distinct and purposeful. ESA, enacted in 1973, included "harass" and "harm" in the definition. Pub. L. 93-205, § 3, 87 Stat. 885. Congress amended MBTA the following year, and did not modify its prohibitions to include "harm." Pub. L. 93-300, § 1, 88 Stat. 190. It is the "harm" part of the definition that makes "significant habitat modification or degradation" illegal. The court cannot do what Congress, and the Department of Interior, did not do. The statute and regulations intended to preserve an endangered or threatened species differ from those adopted pursuant to international treaties.

Id. at 22-23.

Plaintiffs argue that the conclusion that habitat modification which leads to the deaths of protected birds does not violate the MBTA is contradicted by a number of prior court decisions, including the decision in *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (killing birds by polluting their natural habitat violated the

MBTA), and *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (the poisoning of water that lead [sic] to the death of protected birds constitutes a killing in violation of the MBTA).

Plaintiffs argue that the express language of the MBTA that "it shall be unlawful *at any time, by any means or in any manner,* to . . . kill . . . any migratory bird," 16 U.S.C. § 703 (emphasis added), requires the conclusion that the modification of the habitat of migratory birds that leads to the death of these birds violates the MBTA.

The MBTA applies to all lands, private as well as public, and imposes serious penalties for its violations. Defendant and intervenors argue that the MBTA was intended to protect migratory birds "from . . . killing," but was not intended to protect migratory birds "from . . . killing" as a result of habitat destruction. As defendant and intervenors point out, there would have been no need to enact additional legislation to protect the habitat of migratory birds, such as the Endangered Species Act, if the position of plaintiffs was correct.

This court has considered the facts and the law and agrees with Judge Dwyer's decision in *Seattle Audubon v. United States Forest Serv.* that the MBTA was not intended to include habitat modification or degradation in its prohibitions. This court finds that defendant and intervenors are entitled to summary judgment on plaintiffs' fourth claim for relief under the MBTA. However, this court further finds that this is an important issue for which an immediate appeal would be in the interest of all involved in this lengthy litigation. There is no just reason for delay

in entering judgment on this claim, and the court will, when presented with the appropriate form of judgment under Fed. R. Civ. P. 54(b), enter a judgment so that an immediate appeal may be taken.

CONCLUSION

1) Plaintiffs' motion for summary judgment and injunctive relief (#530) is denied.

2) Defendant's second motion for summary judgment (#554) is granted as to plaintiffs' second and fourth claims for relief and denied as to plaintiffs' third claim for relief.

3) Defendant-intervenor Association of O & C Counties and Benton County's motion to strike plaintiffs' statement of undisputed facts (#571) is denied.

4) Defendant-intervenor Association of O & C Counties and Benton County's motion for partial summary judgment (#585) is granted as to plaintiffs' second and fourth claims for relief and denied as to plaintiffs' third claim for relief.

5) Defendant-intervenor Northwest Forest Resource Council's motion for summary judgment (#589) is granted as to plaintiffs' second and fourth claim for relief and denied as to plaintiffs' third claims for relief.

DATED this 8 day of May, 1991.

/s/ Helen J. Frye
HELEN J. FRYE
United States
District Judge

APPENDIX F

SIERRA CLUB
LEGAL DEFENSE FUND
OCT 10 1989

101ST CONGRESS
1st Session HOUSE OF REPRESENTATIVES

REPORT
101-264

MAKING APPROPRIATIONS FOR THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1990, AND FOR OTHER PURPOSES

OCTOBER 2, 1989. – Ordered to be printed

MR. YATES, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2788]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2788) making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1990, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 17, 19, 40, 42, 46, 51, 52, 53, 65, 66, 67, 68, 69, 73, 77,

80, 89, 90, 99, 101, 103, 108, 109, 115, 116, 117, 127, 130, 147, 154, 155, 156, 157, 158, 159, 160, 161, 162, and 163.

That the House recede from its disagreement to the amendments of the Senate numbered 2, 3, 4, 5, 6, 7, 20, 29, 30, 36, 56, 74, 75, 78, 82, 119, 125, 126, 141, 148, and 151, and agree to the same.

Amendment numbered 1:

That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$442,084,000;* and the Senate agree to the same.

Amendment numbered 8:

That the House recede from its disagreement to the amendment of the Senate numbered 8, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$5,961,000;* and the Senate agree to the same.

Amendment numbered 9:

That the House recede from its disagreement to the amendment of the Senate numbered 9, and agree to the same with an amendment, as follows:

* * *

SEC 318. (a) From funds appropriated under this Act or otherwise made available –

(1) The Forest Service shall offer, notwithstanding the provisions of the Federal Timber Contract

Payment Modification Act of 1984 (16 U.S.C. 618(a)(5)(C)), an aggregate timber sale level of seven billion seven hundred million board feet of net merchantable timber from the national forests of Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with existing land and resource management plans or land and resource management plans as approved except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, such sales shall be consistent with the preferred alternative of the draft land and resource management, place and accompanying draft environmental impact statement dated October 1, 1986 pending approval of a final land and resource management plan for the Siuslaw National Forest: Provided, That of the seven billion seven hundred million board foot aggregate timber sale level of fiscal years 1989 and 1990, timber sales offered from the thirteen national forests in Oregon and Washington known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of five billion eight hundred million board feet of net merchantable timber: Provided further, That the sales volume shall be distributed in the same proportion between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988 and;

(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted

owls prepared or offered pursuant to this section shall minimize fragmentation of the most ecologically significant old growth forest stands. "Old growth forest stands" are defined as those stands meeting the criteria according to Forest Service Research Publication #PNW-447. In those instances where the Forest Service, after consultation with the advisory boards established pursuant to subsection (c) of this section, determines that the definition in Forest Service Research Publication #PNW-447 is not fully applicable in national forests known to contain northern spotted owls, the Forest Service shall use old-growth definitions contained in its Pacific Northwest Regional Guide.

(2) To the extent that fragmentation of ecologically significant old growth forest stands is necessary to meet the timber sale levels directed by subsection (a)(1) of this section, the Forest Service shall minimize such fragmentation in the ecologically significant old growth forest stands on a national forest-by-national forest basis based on the Forest Service's discretion in determining the ecologically significant stands after considering input from the advisory boards created pursuant to subsection (c) of this section. The habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas (SOHAs) described in subsection (b)(3) of this section shall be considered an important factor in the identification of ecologically significant old growth forest stands.

(3) No timber sales offered pursuant to this section from the thirteen national forests in Oregon and Washington known to contain northern spotted owls may occur within SOHAs identified pursuant to the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific

Northwest Regional Guide -- Spotted Owl and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 as adjusted by this subsection:

(A) For the Olympic Peninsula Province, which includes the Olympic National Forest, SOHA size is to be 3,200 acres;

(B) For the Washington Cascades Province, which includes the Mt. Baker-Snoqualmie, Okanogan, Wenatchee, and Gifford-Pinchot National Forests, SOHA size is to be 2,600 acres;

(C) For the Oregon Cascades Province, which includes the Mt. Hood, Willamette, Rogue River, Deschutes, Winema, and Umpqua National Forests, SOHA size is to be 1,875 acres;

(D) For the Oregon Coast Range Province, which includes the Siuslaw National Forest, SOHA size is to be 2,500 acres; and

(E) For the Klamath Mountain Province, which includes the Siskiyou National Forest, SOHA size is to be 1,250 acres.

(F) All other standards and guidelines contained in the Chief's Record of Decision are adopted.

(4) In planning for the preparation and offer of timber sales authorized in subsection (a)(1) of this section, the Forest Service, to the extent possible in areas proximate to SOHA sites identified in subsection (b)(3) of this section, should exercise discretion in selecting sites and/or silvicultural prescriptions in order to retain spotted owl habitat characteristics in such areas. The Forest Service should consider the relative location and quality of such areas contiguous to the SOHAs and should give higher priority to preparing and offering sales in areas of lower quality and less important location than to

areas of greater quality and more important location relative to the SOHAs.

(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife and the U.S. Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

(6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide – Spotted Owl Guidelines and the accompanying Record of Decision, issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and

Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

(B) The Forest Service is directed to review and revise as appropriate the decision adopted in the December, 1988 Record of Decision referenced in subsection (b)(6)(A) of this section and shall consider any new information gathered subsequent to the issuance of the Record of Decision, including the interagency guidelines for conservation of northern spotted owls developed by the Interagency Scientific Committee to address conservation of the northern spotted owl. This review, and any resulting changes to the December, 1988 decision determined to be necessary by the Forest service are to be completed and in effect not later than September 30, 1990.

(c)(1) The Secretaries of Agriculture and the Interior shall name advisory boards on a national forest-by-national forest and Bureau of Land Management district-by-district basis which shall be comprised of not more than seven individuals who, in the appropriate Secretary's judgment, represent a diversity of views. In the process of selecting individuals to serve on the advisory boards, the Secretaries shall make every effort to recognize the diversity of views and perspectives and allow parties which represent a cross-section of those views to participate in making recommendations in the selection of board members, provided that every effort will be made to ensure the advisory boards are comprised of an equal number of representatives of environmental and business concerns. The advisory boards shall be named not later than thirty days after

enactment of this Act. The advisory boards shall provide recommendations to the Forest Service and the Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their offer. The advisory boards shall present their advice within fifteen or forty-five days after receipt of the necessary review documents. The fifteen-day period applies to single sales and the forty-five-day period applies to multiple sales. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses. The Forest Service and the Bureau of Land Management are authorized to use available funds for the services of professional, independent facilitators to assist in the work of the advisory boards.

(2) The Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards once such boards are established pursuant to this section, including any suggested modifications of individual sales. The Forest Service and Bureau of Land Management shall also consider recommendations made by the U.S. Fish and Wildlife Service on those timber sales conferred upon under Section 7(a)(4) or, if the spotted owl is listed as a threatened or endangered species, consult under Section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1536 (a)(2) and (a)(4)) prior to the offer of any subsequent timber sale in fiscal year 1990. These recommendations shall be considered regardless of whether the agreement provided in subsection (f)(1) of this section has been reached, entered into, and accepted by the relevant court. Adoption or rejection of such recommended modifications shall not require preparation of additional environmental documents, notwithstanding any other provision of law.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service or the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Interior Board of Land Appeals shall issue a final decision on the merits within forty-five days of the date of issuance of such stay. Notwithstanding any other provision of law, any party seeking to challenge a decision made after the date of enactment of this Act to prepare, advertise, offer, or award a timber sale in fiscal year 1990 from the thirteen national forests and Bureau of Land Management lands in western Oregon known to contain northern spotted owls need not exhaust their administrative remedies prior to filing suit. Nothing in this subsection shall alter the administrative appeal requirements of the Forest Service or Bureau of Land Management.

(e) Nothing in this section shall affect interagency cooperation among the Forest Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service under Sections 7(a)(2) and 7(a)(4) of the Endangered Species Act and its regulations.

(f)(1) Not later than two days after enactment of this Act, the Forest Service shall submit to plaintiffs in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160, a list of sales which had been prepared for offer in fiscal year 1989 and which contain at least 40 acres of suitable spotted owl habitat. Not later than fourteen days

after receipt of such list, plaintiffs to the suit referenced in this subsection may enter into an agreement with the Forest Service releasing for sale not less than one billion one hundred million board feet of net merchantable timber. Such sales must be available for advertisement not later than fourteen days after the agreement required by this subsection is reached. Such timber sales selected shall not be subject to further judicial review by any court of the United States.

(2) If the agreement specified in subsection (f)(1) of this section is reached, then those timber sales described in the list submitted to plaintiffs pursuant to subsection (f)(1) of this section but not contained in the agreement authorized by subsection (f)(1) of this section shall not be offered for sale in fiscal year 1990.

(3) If the agreement authorized under subsection (f)(1) of this section is not implemented within the time frames prescribed in subsection (f)(1) of this section, one billion one hundred million board feet of net merchantable timber from such sales submitted to plaintiffs pursuant to subsection (f)(1) of this section shall be selected and modified as appropriate by the Forest Service in accordance with the provisions of this section. Selected sales shall be prepared, advertised, offered, awarded and operated notwithstanding any provision of law that is a basis for any stay, injunction or order issued in the proceeding identified in subsection (f)(1) of this section: Provided, That nothing in this subsection shall affect rights available under the Contract Disputes Act 41 U.S.C. 601 et seq.

(4) The Forest Service shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(5) Timber sales selection pursuant to subsections (f)(1) or (f)(3) of this section shall be based on the following criteria: (1) proportional distribution between Oregon and Washington national forests known to contain northern spotted owls based on the average sale volumes for fiscal years 1986 through 1988; (2) proportional distribution to the extent possible among the thirteen national forests known to contain northern spotted owls in Oregon and Washington based on the average sale volumes for fiscal years 1986 through 1988; and (3) to the extent possible, selection of sales outside the habitat of nesting pairs of spotted owls which are not in the Spotted Owl Habitat Areas described in subsection (b)(3) of this section.

(g)(1) No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code shall not apply to any challenge to such a timber sale: Provided, That the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary, capricious or otherwise not in accordance with law: Provided further, That any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale: Provided further, That for forty-five days after the date of filing of a challenge to a timber sale the affected agency shall take no action to award a challenged timber sale. Civil actions filed under this section shall be assigned for hearing at the earliest possible date and shall take precedence over all other matters

pending on the docket of the court at that time except for criminal cases: Provided further, That the court shall render its final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirements of the United States Constitution.

(2) Notwithstanding any other provision of law, the court may set rules governing the procedures of any such proceedings which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter than the limits specified in the Federal rules of civil or appellate procedure.

(3) In order to reach a decision within forty-five days, the Federal District Court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(h) The Forest Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process recognized under subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House of Representatives for appropriate referral. Such reports shall also include information on the extent to which recommendations of the advisory boards established pursuant to subsection (c) of this section were integrated into timber sale decisions as well as reasons for modifying or not adopting recommendations made by the advisory boards. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(i) Except for provisions of subsection (a)(1) of this section, the provisions of this section apply solely to the thirteen

national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon or Washington.

(j) The advisory boards established under this section shall be subject to the Federal Advisory Committee Act (86 Stat. 770).

(k) Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sales contracts. All other provisions of this section shall remain in effect until September 30, 1990.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

The amendment sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat for northern spotted owls, and for minimizing fragmentation of significant old growth forest stands.

The managers have agreed to this provision because a large portion of the Forest Service's and Bureau of Land Management's (BLM) fiscal year 1989 timber sale programs on the thirteen national forests in Oregon and Washington and five BLM administrative districts in western Oregon known to contain northern spotted owls have been interrupted due to legal challenges, and because these challenges have raised serious concerns

about the adequacy of planned actions of the agencies with regard to managing habitat for the northern spotted owl and minimizing fragmentation of old growth stands. The managers are extremely concerned that the agencies did not pursue avenues to resolve the conflicts or more adequately address the issues raised in these legal challenges, thereby requiring the inclusion of this section. The extraordinary measures included in this section, particularly with regard to judicial processes, have been reluctantly agreed to because of the failure of the agencies to take steps on their own to resolve these matters in a manner which could have prevented the current situation. These measures included in this provision have been provided on an interim basis for fiscal year 1990 only, during which the BLM and Forest Service are expected to take further action to address these concerns, as discussed in the Act and in this statement. Except for provisions relating to timber sale volume, this section does not apply to the six National Forests in Region Six which do not contain northern spotted owls.

In developing the amendment, the managers have sought to balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands. In reconciling these often conflicting goals, the managers have limited all provisions in this subsection to fiscal year 1990, except that the timber sales offered under this section in fiscal year 1990 are covered by its terms and conditions throughout the length of the timber sale contracts. Sales offered under this section but not awarded and withdrawn after October 1, 1990 under normal Forest Service and BLM procedures may not be

reoffered in subsequent fiscal years under the terms of this section. While it may be difficult to prepare substantial new sale volumes, the managers encourage the Forest Service to make every effort possible to prepare and offer new sales as part of the fiscal year 1990 program.

The managers have included language to ensure that the fiscal year 1990 sales volume is distributed in the same proportion between the states of Oregon and Washington, and to encourage proportional distribution of sales released through subsection (f). The managers agree that the proportional distribution should be based on the time frame of fiscal years, 1986, 1987, and 1988 to reflect an accurate historic sales time period on which to base the sales program pursuant to the provisions of this section.

The amendment provides discretion to the Forest Service in the placement of timber sales proximate to Spotted Owl Habitat Areas (SOHAs). However, as the language in the Act states, the Forest Service should give consideration to the location and quality of proximate habitat in the course of sequencing areas for timber sales, by giving priority to timber sales in areas of lesser quality prior to consideration of sales in areas of greater quality, as necessary to meet the timber targets. The agencies are also urged to give consideration in the planning, scheduling, and offering of timber sales in fiscal year 1990 to minimize, to the extent feasible, the possibility that existing spotted owl populations will become isolated.

The managers have chosen to substitute adjusted interim standards for SOHAs for national forest lands in lieu of the spotted owl management Record of Decision

(ROD) published in December, 1988. The designations contained in this section are made without prejudice to the validity of the Forest Service's ROD. However, the Forest Service is directed to review its ROD and make revisions to it as appropriate. In so doing, the Forest Service should develop documentation to support any revisions to the ROD. It is expected that the agency will give careful consideration to the recommendations of the Interagency Scientific Committee in reaching any final decisions regarding revisions to the ROD. The managers expect that the agency will make available to the Congress and the public explanations of any decisions to modify or reject such recommendations.

The legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Seattle Audubon Society/Washington Contract Loggers Association v. Robertson* cases against the current Forest Service owl management ROD or any cases which may be filed against a revised ROD.

The managers expect that the Forest Service shall make every reasonable effort to complete land and resource management plans by the end of the fiscal year 1990.

The managers have chosen for fiscal year 1990 to expand by 12 sites the network of SOHAs identified through the December, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife (ODFW). This expanded reservation of areas for spotted owls again is deemed adequate to address for fiscal year 1990 only the concerns raised in

the *Portland Audubon Society v. Lujan* case. The legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case against current BLM owl management activities or any cases which may be filed against future BLM management decisions.

The BLM shall continue to work in consultation with ODFW and the U.S. Fish and Wildlife Service to ensure that, to the extent practicable, the agencies coordinate their efforts in identifying and defining the 12 additional high priority spotted owl habitat areas.

Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD or the BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsections (b)(3) and (b)(5) establish interim SOHA standards for fiscal year 1990 which protect more habitat than currently protected by the Forest Service and BLM, subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards as a reason for injunctive relief. These provisions do not expire for the contracts resulting from timber sales offered through September 30, 1990 and subsequently awarded under this section. Subsection (b)(6)(A) should be read in combination with subsection (g) which establishes expedited procedures for challenging timber sales in court. Together, these two subsections preserve the opportunity for judicial review of individual timber sales on a single-sale basis.

This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities.

Nothing in this section is intended to prejudge any future decision with regard to the current listing process for the northern spotted owl pursuant to the Endangered Species Act, any final decisions that may be reached by a Federal court in the *Seattle Audubon/Washington Contract Loggers Assoc. v. Robertson* cases and the *Portland Audubon v. Lujan* case, any revisions that may be made by the Forest Service to the ROD or any revisions that may be made by BLM to its owl management policies. In addition, nothing in this section is intended to affect any decision by the Forest Service to offer for sale after fiscal year 1990 any timber volume which was not sold during fiscal year 1990 pursuant to subsection (f) of this section or the process by which sales are prepared and offered after fiscal year 1990.

Seven-member advisory boards are to be established to provide input on the agencies' timber sale program. The managers intend these boards to be established on a national forest-by-national forest or BLM district-by-district basis, and to be comprised of persons knowledgeable about the resource values of the particular forest or district. The boards will review timber sales and make their recommendations about which sales should be prohibited, released, or modified in furtherance of all provisions of this section, and the agencies are urged to consider fully these recommendations. The managers intend that the boards will be comprised of and will fairly represent the diverse views of the interests affected by this section.

The managers expect the advisory boards to seek to minimize conflicts involved in this issue.

The section limits administrative appeals to one level of review in each agency, and sets time limits on the resolution of appeals in cases where an action is stayed. Also, appellants need not exhaust their appeal opportunities before filing suit under the terms of this section. No other changes to the appeals process are made.

Release of 1.1 billion board feet of net merchantable timber sales prepared for the Forest Service's fiscal year 1989 program shall be achieved through either of two mechanisms: an agreement between the Forest Service and plaintiffs in the *Seattle Audubon Society* case or, in the absence of such an agreement on a timely basis, by the Forest Service. Sales prepared but not released under either of these mechanisms shall not be available as part of the fiscal year 1990 sale offer program.

The section narrows the time frame for filing civil actions in court and prohibits the issuance of pre-trial restraining orders and injunctions. It does encourage, however, that trials be scheduled and decided expeditiously.

The managers take note of the new Cedar River Municipal Watershed policies recently adopted by the City of Seattle for management of the City's 81 percent ownership of the watershed. The policies balance City land management in the Cedar River Municipal Watershed between habitat preservation and timber management. The United States owns about 18 percent of the Cedar River Municipal Watershed in the Mt. Baker-Snoqualmie National Forest. The managers note the long

history of cooperation between the City of Seattle and the Forest Service in managing the Cedar River Municipal Watershed. The City and Forest Service have agreed in the past to use land exchanges to achieve City ownership of the watershed for water quality protection. The managers note that the recently adopted City policies require comprehensive negotiations between the City and the Forest Service to achieve land and timber exchanges. The managers support this negotiation process and encourage both parties to continue to strive for expeditious agreement.

The Forest Service and BLM shall, upon request, make available within five working days timber sale environmental assessments and related documentation.

The managers are encouraged by the formation of the Interagency Scientific Committee for the purpose of developing a strategy for conservation of the northern spotted owl. The managers understand that the Committee expects to complete its recommendations by no later than June, 1990 and encourage the agencies to provide necessary support to complete expeditiously the work of the Committee. The managers expect that the recommendations and report of the Committee will be made available to the public.

The managers expect that by January 30, 1990, the BLM will provide to the appropriate committees of Congress a report explaining agency actions and intentions to coordinate and integrate spotted owl management plans on its administration districts containing spotted owls. The managers further expect that the BLM will consider carefully any recommendations made by the Interagency

Scientific Committee in the development of its new land and resource management plans.

Within 30 days of receipt, the Forest Service and BLM will make available to the public recommendations received from the Fish and Wildlife Service pursuant to actions undertaken in accordance with provisions of the Endangered Species Act.

Amendment No. 168: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment as follows:

In lieu of the matter proposed by said amendment, insert:

Sec. 319. (a)(1) Subchapter III of chapter 13 of title 31, United States Code, is amended by adding at the end thereof the following new section:

APPENDIX G

[x] FILED [ ] ENTERED
[ ] LODGED [ ] RECEIVED

DEC 18 1990

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY ___ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

F. DALE ROBERTSON, et al.,

Defendants.

No. C89-160WD

CONSOLIDATED WITH

No. C89-99(T)WD

ORDER ON MOTIONS HEARD DECEMBER 5, 1990

WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,

Plaintiffs,

v.

F. DALE ROBERTSON, et al.,

Defendants.

I.

INTRODUCTION

These consolidated cases arise from the ongoing controversy over logging in old growth national forests in Oregon and Washington. The parties are Seattle Audubon Society, et al. ("SAS"); Washington Contract Loggers Association, et al. ("WCLA"); and F. Dale Robertson, Chief of the United States Forest Service, et al. ("Forest Service"). On December 5, 1990, oral argument was heard on several motions for summary judgment and for other relief. These motions concern the legal status of several timber sales and of an administrative decision made by the Forest Service in December 1988. To understand the motions it is necessary to review the history of this litigation.

II.

HISTORY OF THESE CASES IN DISTRICT COURT AND COURT OF APPEALS

The National forests are managed by the Forest Service under the National Forest Management Act, 16 U.S.C. § 1600 *et seq.* ("NFMA"). Regulations promulgated under the NFMA require, among other things, that the agency manage habitats in the national forests to maintain viable populations of existing vertebrate species. 36 C.F.R. § 219.19 (1989). Since not every species can be monitored, "indicator species" are observed carefully as signs of general wildlife viability. *Id.* at § 219.19(a)(1). The northern spotted owl is an indicator species. While having these conservation duties, the Forest Service is also

charged with managing these lands to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefit in an environmentally sound manner." 36 C.F.R. § 219.1(a) (1989). *See generally* C. Wilkinson & H. Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1 (1985).

In recent years logging and development have steadily reduced wildlife habitat in the Pacific Northwest. At the same time many local mills have experienced log shortages. The result is an intensified struggle over the future of the national forests, and especially over the old growth remaining

The present cases began in 1989 when SAS and WCLA sued the Forest Service, challenging the legality of an administrative decision adopting standards and guidelines for managing northern spotted owl habitat in the national forests of Washington and Oregon. The administrative decision is set out in a Record of Decision ("ROD") issued on December 8, 1988, and an accompanying Final Supplement to the Environmental Impact Statement For an Amendment to the Northwest Regional Guide ("FSEIS"). For opposite reasons, the two sets of plaintiffs challenged the Forest Service's plan under the NFMA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and their implementing regulations. SAS also relied on the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703, *et seq.*, and its implementing regulations.

The court consolidated the two cases, ordered them expedited, and set a final hearing date for June 13, 1989.

On March 24, 1989, the court issued a temporary injunction deferring specified timber sales in Washington and Oregon for what then appeared to be a few weeks until the final hearing. Order on Motions for Preliminary Injunction and Change of Venue at 2 (Mar. 24, 1989) (Dkt. # 97).

On May 11, 1989, the Forest Service moved for a stay of all proceedings in these cases pending completion of conference process between the Forest Service and the Fish and Wildlife Service ("FWS"). The latter agency had announced on April 25, 1989, its decision – reversing an earlier decision – to list the northern spotted owl as "threatened" under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. SAS and WCLA agreed that a stay was warranted. The Forest Service proposed a temporary ban on timber sales containing forty or more acres of spotted owl habitat. This was adopted by order of May 26, 1989. Order on Motion for Stay (May 26, 1989) (Dkt. # 173).

The Forest Service had stated its intent to present within thirty days interim measures to protect spotted owl habitat during the FWS listing process. It did not do so. Instead it moved on August 24, 1989, for leave to go forward with eleven timber sales that had been deferred. At this point there was no spotted owl management plan in effect. The court on its own motion lifted the stay and ordered an expedited final hearing in these cases. Order Lifting Stay, etc. (Sept. 12, 1989) (Dkt. # 226).

Congress in the meantime was debating legislation which would provide a short-term supply of national forest timber to mills in Washington and Oregon without

having the usual type of agency action subject to judicial review. The final result was section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("Section 318"), which became law on October 23, 1989.

Section 318 includes the following provisions:

– It directs the Forest Service to offer an aggregate timber sale level of 7.7 billion board feet from the national forests of Washington and Oregon for fiscal years 1989 and 1990, of which 5.8 billion board feet were to come from the thirteen national forests in those states known to contain northern spotted owls. Subsection (a)(1).

– It directs that all timber sales in those thirteen forests "shall minimize fragmentation of the most ecologically significant old-growth forest stands" and that, if fragmentation proves necessary to meet the timber sale levels, "the Forest Service shall minimize such fragmentation in the ecologically significant old-growth forest stands on a national forest-by-national forest basis. . . ." Subsections (b)(1) and (b)(2).

– It prohibits timber sales within spotted owl habitat areas ("SOHAs") identified pursuant to the FSEIS and the ROD issued by the Forest Service on December 8, 1988, as adjusted by Congress to increase the size of protected areas, and provides: "All other standards and guidelines contained in the Chief's Record of Decision are adopted." Subsection (b)(3).

– It states that Congress "determines and directs" that management of the thirteen forests for fiscal years 1989-90 according to subsection (b)(3) "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the present cases and a similar case pending in the district of Oregon]." Subsection (b)(6)(A).

– It provides: "The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." Subsection (b)(6)(A).

– It provides that any challenge to a 1989-90 timber sale in the thirteen forests must be filed in federal district court within fifteen days of the initial advertisement of the sale, and must be decided within forty-five days unless a longer period is required for constitutional reasons. Subsection (g)(1).

On November 6, 1989, this court vacated the preliminary injunction because section 318 had become law as to 1989-90 timber sales. The court construed the statute as a temporary amendment of the environmental laws, and therefore rejected SAS's constitutional challenge to subsection (b)(6)(A). Memorandum Decision (Nov. 14, 1989) (Dkt. # 278).

An interlocutory appeal was certified under 28 U.S.C. § 1292(b). The court of appeals declined to stay the application of section 318 pending appeal.

Over the next several months the parties proceeded under section 318. SAS brought a series of challenges to

timber sales under the standards of the temporary statute. On May 11, 1990, this court entered an order on the first such challenge, enjoining the Cowboy sale in the Umpqua National Forest. On appeal by the Forest Service, the court of appeals, affirmed in an unpublished opinion filed August 27, 1990, stating:

> [S]ection 318(b)(2) imposes restrictions on sales from these spotted owl national forests. Under Section 318(b)(2) sales may not fragment ESOG forest stands unless the fragmentation is necessary to meet the timber sales levels of Subsection (a)(1). In addition, if USFS determines that fragmentation is necessary, fragmentation must be minimized on a national forest-by-national forest level.

Seattle Audubon Soc'y v. Robertson, No. 90-35519, unpublished opinion at 2 (9th Cir. 1990).

Other challenges to 1990 timber sales followed the district court decision on the Cowboy sale. The court enjoined the Nita, South Nita, and Garden timber sales on the basis that the Forest Service had not complied with section 318. (Dkt. ## 608, 677). The Forest Service has not appealed from those rulings. The agency withdrew two other sales after a motion for summary judgment was filed. The court found for the Forest Service as to the Briggs Ridge sale in the Siskiyou National Forest. (Dkt. # 459). SAS has not appealed from that ruling.

On September 18, 1990, the court of appeals issued an opinion finding section 318(b)(6)(A) unconstitutional under the separation of powers doctrine. On October 30, 1990, in response to a request for clarification, the court of appeals amended its opinion. *Seattle Audubon Soc'y v.*

Robertson, Nos. 90-35020, 90-80008, 90-35120, slip op. 13465 (9th Cir. as amended Oct. 30, 1990).

The appeal to the Ninth Circuit concerned subsection (b)(6)(A) of section 318, in which Congress "determines and directs" that management of the forests in 1989-90 according to subsection (b)(3) and (b)(5) "is adequate consideration for the purpose of meeting the statutory requirements" underlying the cases in this district and in Oregon. If Congress, instead of saying that, had said it was temporarily amending the environmental statutes, it would have achieved its goal. *Id.* at 13479-81. But the provision as worded violates the separation of powers because it tries to adjudicate rather than to legislate. *Id.* at 13479. Section 318 cannot be read as a temporary amendment or repeal of the environmental laws, even though parts of it "add additional requirements." *Id.* at 13478. Accordingly, the constitutionality rulings of this court and the District of Oregon as to subsection (b)(6)(A) were reversed. *Id.* at 13481.

The Ninth Circuit's decision does not affect the parts of section 318 that establish standards, and set a timetable for challenges, as to 1989-90 timber sales. It has no effect on the rulings made during 1990 on challenges brought under the section 318 standards. It does not conflict with the court of appeals' earlier affirmance of the order enjoining the Cowboy sale under section 318. It deals, as amended, only with the first sentence of subsection (b)(6)(A). The appellate court has declined to express an opinion as to the second sentence, which provides that the guidelines adopted by subsections (b)(3) and (b)(5) shall not be subject to judicial review. *Id.* at 13481 n. 4.

While the above-described court proceedings were taking place, federal administrative agencies took further action regarding the spotted owl. In April 1990 the Interagency Scientific Committee released its findings and recommendations in a report entitled "A Conservation Strategy for the Northern Spotted Owl." Report of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl, *A Conservation Strategy for the Northern Spotted Owl* (U.S.D.A., *et al.*, 1990). In June 1990 the Fish and Wildlife Service listed the owl as a threatened species under the Endangered Species Act, 16 U.S.C. 1531 *et seq. See* U.S. Fish and Wildlife Service, "Endangered and Threatened Status for the Northern Spotted Owl," 55 *Fed. Reg.* 26114 (June 26, 1990).

On September 28, 1990, the U.S. Department of Agriculture gave notice that the Forest Service was "vacating the decision contained in the December 1988 Record of Decision which amended the Regional Guide for the Pacific Northwest Region with regard to management of northern spotted owl habitat." The notice was published at 55 *Fed. Reg.*, 40412 (Oct. 3, 1990).

The present situation may thus be summarized as follows: The court of appeals has held that the first sentence of subsection (b)(6)(A) of section 318 is unconstitutional; the remainder of section 318 survives as a non-exclusive statute which this court must apply to 1990 timber sales; the December 1988 ROD as an administrative measure has been vacated; and the Forest Service has announced that any future actions affecting northern spotted owl habitat will comply with the Endangered Species Act.

III.

CROSS-MOTIONS AS TO TWELVE SALES

From the time section 318 was adopted to the date of the court of appeals decision, a period of almost a year, all challenges to 1990 timber sales were brought under the temporary statute. SAS's claim in each instance was that the Forest Service had failed to comply with section 318's requirement that it avoid or minimize fragmentation of ecologically significant old growth. This contention was upheld as to four sales and rejected as to one. No challenge was filed on the basis that the Forest Service would be violating the NFMA, NEPA, or any other general statute.

Now, in the wake of the court of appeals decision, SAS has challenged twelve proposed 1990 timber sales under NFMA, NEPA, and MBTA. The challenges were filed within the fifteen-day period required by section 318(g)(1). The Forest Service has cross-moved for summary judgment as to the same sales. The parties agree that a briefing and hearing schedule longer than forty-five days for these motions was necessary, and the court approved their schedule. (Dkt. # 674). The court finds that no genuine issue of material fact for trial is presented as to these motions. WCLA's request for an evidentiary hearing is denied as unnecessary.

The twelve sales, which have been advertised and bid on but not yet awarded, are as follows: Briggs Secret, China-Left, and Sugarloaf in the Siskiyou National Forest; Lower Sweet, Prong, Lower Bailey, and Mister Rogers in the Siuslaw National Forest; and Mocha, Syrup, Roaring

Pot, Red 90, and Marion 90 in the Willamette National Forest.

The standard of review is set out in section 318(g)(1):

> [T]he courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary, capricious, or otherwise not in accordance with law.

A challenge may be decided on motions for summary judgment where there is no genuine issue of fact for trial. *See* Order on Cross-Motions for Summary Judgment re Cowboy Sale at 8-10 (May 11, 1990) (Dkt. # 389).

It is agreed that in advertising these sales the Forest Service has complied with the requirements of section 318 itself. Those requirements are that fragmentation of ecologically significant old growth be avoided altogether unless necessary to meet the sales quotas; that fragmentation, if any is necessary, be minimized; and that there be no logging in SOHAs. Subsections (b)(2) and (b)(3). SAS contends that the twelve sales nevertheless cannot go forward because the Forest Service has not complied with the following statutory provisions:

– The requirement of the NFMA that the Forest Service have in place "plans for units of the National Forest System" that "incorporate the standards and guidelines" required by 16 U.S.C. § 1604(c), one of which requires the agency to assure the viability of all native vertebrate species, 16 U.S.C. § 1604(g) and 36 C.F.R. § 219.19;

– The requirement of NEPA that a federal agency examine and disclose in a sufficient environmental impact statement the environmental effects of proposals for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C); and

– The requirement of MBTA, 16 U.S.C. § 703, that anyone seeking to take or kill birds such as the northern spotted owl obtain a permit pursuant to regulations promulgated by the Fish and Wildlife Service.

The Forest Service's primary response is that these provisions do not apply to 1990 timber sales in the thirteen forests because section 318 occupies the field. Even removing the unconstitutional first sentence of subsection (b)(6)(A), the agency argues, the balance of the statute sets out a comprehensive short-term plan for timber sales which provides all the regulation that Congress intended would exist until section 318's expiration date.

The difficulty with this argument is that, while Congress unquestionably intended that result (as all parties agreed at the December 5 hearing), the court of appeals has ruled that it failed to achieve it. On September 29, 1990, this court sent a letter to the court of appeals seeking clarification of the September 18 decision. One of the questions asked was the following:

> Congress appears to have intended that Section 318's standards would preempt the field as to 1990 sales. However, the question now arises whether it achieved that, in light of the Court of Appeals September 18 decision. The issue is that: Does Section 318 contain in full the substantive standards the Forest Service must meet

> as to 1990 sales in the forests covered by the statute? Or does agency have to comply with both the requirements of Section 318 *and* any that may exist under general statutes such as the National Forest Management Act?

Letter to Clerk, Court of Appeals, at 5 (Sept. 29, 1990) (Dkt. # 609).

In response to that question the court of appeals amended its opinion to include the following passage: "Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections *add additional requirements.*" Slip op. at 13478 (emphasis added).

The court of appeals opinion goes on to say:

> The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes [sic] involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.
>
> In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution. For example, if the Secretary follows subsection (b)(3) and (b)(5), then the Secretary will be found to have used the "principles of multiple use and sustained yield" and the "systematic inter-disciplinary approach" mandated by the Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(1) and (2). In addition, the agency will be deemed to have included

> detailed statements of adverse environmental effects and alternatives required under NEPA, 42 U.S.C. § 4332. Also, there will have been no taking of habitat as proscribed under the Migratory Bird Treaty Act, 16 U.S.C. § 703.

Id. at 13478-79.

It would be possible to argue that, even with subsection (b)(6)(A) invalidated, the remaining parts of section 318 show a congressional intent to occupy the field as to 1990 timber sales. But the language in the statute that might support such an argument – including the provision of subsection (b)(3)(F) that "all other standards and guidelines contained in the Chief's Record of Decision are adopted" – was brought explicitly to the Ninth Circuit's attention in the September 29 letter requesting clarification. The response of the court of appeals is that section 318 does not repeal or amend any environmental law "even though some subsections add additional requirements." This is a clear holding that section 318's requirements are in addition to those imposed by the general environmental statutes, and that the latter remain fully applicable.

It is true, as the Forest Service points out, that section 318, insofar as it is a constitutional statute, must be given "such effect that no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant." *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971). The court of appeals has done that by reading the statute's requirements as supplemental to those of the general environmental statutes. Section 318 does not, under the Ninth Circuit's holding, set out a comprehensive management plan. Its prohibition on logging in SOHAs is valid

and must be observed, but to satisfy that requirement is not necessarily to satisfy the requirements of other laws such as the NFMA and NEPA.

As the now-withdrawn ROD acknowledged, the NFMA and its implementing regulations require that the Forest Service provide for diversity of plant and animal communities in order to meet overall multiple-use objectives. Population viability of native vertebrate species is an integral part of providing for animal diversity. NEPA and its implementing regulations direct procedures to insure that public officials are provided reasonable alternatives before decisions are made or actions are taken.

The Forest Service has proceeded on the assumption that the standards and guidelines of section 318 occupied the field for 1990 timber sales, and that no other environmental statutes applied. The court of appeals decision, however, requires a ruling now that compliance with the standards of section 318 does not in itself suffice to legalize the twelve challenged sales. The agency has not shown that these other requirements have been met. For these reasons, applying the court of appeals decision as amended, it must be held that the Forest Service's decision to advertise and award these twelve sales is contrary to law. An order will be issued enjoining the sales until such time as the agency shows compliance with applicable law.

In seeking to show compliance the Forest Service has leave to argue that it has complied with the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, as to these sales, and that the requirements of ESA supersede those of all other statutes. That issue is the centerpiece of recently-filed

motions which are not yet fully briefed. SAS has moved for summary judgment on its second amended complaint, contending that the Forest Service is violating NFMA, NEPA, and MBTA in regard to further logging of owl habitat. The Forest Service has cross-moved for summary judgment on the same claims. The agency argues that its duties in regard to the owl, since the species was listed as threatened, "are no longer defined by [the NFMA]; they are governed by the Endangered Species Act, 16 U.S.C. 1531 *et seq.*," and that "in no way can [the NFMA] be read as imposing upon the agency duties toward the northern spotted owl that are independent from or in addition to the detailed requirements of the Endangered Species Act." Memorandum in Support of Defendants' Motion for Summary Judgment on Second Amended Complaint at 11, 15 (Dec. 5, 1990) (Dkt. # 751). SAS takes the opposite position. By agreement of the parties the new motions have been noted for January 11, 1991. The parties should have a chance to finish briefing that issue before it is decided.

IV.

OTHER MOTIONS

The other pending motions are SAS's motion for summary judgment under NFMA, NEPA, and MBTA as to five sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed; the Forest Service's cross-motion for a ruling that the question as to the five sales is moot; SAS's motion for summary judgment that the December 1988 ROD and FSEIS (as administrative measures, not as

temporary statutory law under section 318) violate the environmental statutes; the Forest Service's cross-motion on the latter subject, asserting that no case or controversy exists because the ROD has been withdrawn; the Forest Service's motion to dismiss WCLA's complaint; and the Forest Service's motions to dismiss certain claims of SAS's second amended complaint. These motions do not involve specific currently-proposed timber sales. They raise general questions related to those involved in the motions noted for January 11, 1991, and should be decided together with the latter.

V.

ORDER

For the reasons stated, the Forest Service is enjoined from awarding the Briggs Secret, China-Left, Sugerloaf, Lower Sweet, Prong, Lower Bailey, Mister Rogers, Mocha, Syrup, Roaring Pot, Red 90, and Marion 90 sales until such time as it shows compliance with the applicable environmental statutes. In attempting to make that showing the Forest Service has leave to argue, as urged in its motion for dismissal noted for January 11, 1991, that it has complied with the ESA and that such compliance is sufficient. The other motions heard on December 5 will be decided together with those noted for January 11.

The clerk is directed to send copies of this order to all counsel of record.

Dated: December 18, 1990.

/s/ William L. Dwyer
Williams L. Dwyer
United States District Judge